These pages

are respectfully inscribed to

HON. THEODORE W. DWIGHT, LL. D.,

the distinguished advocate and teacher, in acknowledgment of his profound influence over the minds and hearts of the young aspirants for professional honors; and in expression of a personal gratitude for repeated acts of kindness and friendly interest.

PREFACE.

In presenting to the legal profession a work on the law of Commercial Paper, the author desires to call special attention to the fact that there is no other treatise in print, which in one volume gives a full and comprehensive treatment of the whole subject. There are one volume treatises on bills, and on bills and notes, in which that part of the subject of Commercial Paper is more or less fully treated; but none on Commercial Paper, a term which includes the consideration, not only of the subject of bills and notes, but of a great deal more. The claim is made for the present work, that,—by a system of condensation of statement, in which the important element of perspicuity is nevertheless found harmonious with the fundamental aim, — it contains statements of every important principle, which is discussed in any present treatise of two or three volumes.

The author trusts that his present venture in the literary field will receive at the hands of his professional brethren the same generous treatment which they accorded to his prior efforts; and he further indulges the hope that his treatise on Commercial Paper will be found to supply a real and substantial want.

C. G. T.

University of Missouri,
Columbia, Mo., Sept. 21, 1889.

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THE LAW

OF

COMMERCIAL PAPER.

CHAPTER I.

THE ORIGIN AND FUNCTIONS OF COMMERCIAL PAPER.

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§ 1. **Commercial paper defined.** — Commercial paper may be defined to include all those instruments of indebtedness, which are treated and used, in the commerce of the world, as the equivalents or representatives of money, or which are given the characteristics of money in the furtherance of commercial ends. Negotiable paper or instruments, are synonymous terms. At a very early day in the history of primitive peoples, the commerce was conducted exclusively by barter and exchange of commodities. A given number of cattle would be exchanged for a given

number of horses, or so many bushels or measures of wheat for a certain quantity of some other commodity. But almost in the dawn of history, the use and value of money for the facilitation of trade were recognized, and instead of barter and exchange, it became the common custom to sell the commodity for so many pieces of money. At first the precious metals were used in bullion, but the advance was soon made to the stamping and coining of pieces of certain fixed weight and denomination. For a very long time, the employment of money seemed to satisfy every demand of commerce; but finally its development and extension caused the actual manual transfer of the money, particularly when it had to be transported from place to place, to become exceedingly burdensome and costly. There was also great danger of robbery and destruction in the transportation of money. The need of a representative of money, which could safely and easily be transferred from one person to another and from place to place, was thus felt, and supplied by the various kinds of commercial paper, which have from time to time been adopted by the commercial world.

The most striking characteristic of money is its currency, its easy circulation from hand to hand for whatever it is worth. It has always been the rule of law in England and in this country, that the purchaser of a chattel, of a horse or a cow, could acquire no better title to it, than his vendor possessed. And if the vendor's title was defective for any reason, because he had stolen or appropriated what belonged to another, the good faith of the vendee and his ignorance of the wrongful appropriation would not furnish him with any defense to the real owner's action of trover or replevin. There was an exception to this rule, recognized by the English law, in the case of goods sold in the open market or fair. But this exception does not exist in the United States, and the rule is universally enforced. But it is probably the law in all civilized communities, that money

is not subject to this rule; that if one misappropriates money belonging to another, and transfers it for value to a third person, who receives it in good faith and without knowledge of the true ownership, the third person acquires an absolute title to it, against even the true owner. The true owner can only recover it of those who receive it with actual or constructive notice of the defect of title, or without consideration.[1] The reason sometimes assigned for this rule in respect to money is that there is no way in which one piece of money can be distinguished from another piece of the same denomination. But this is not true. As Professor Parsons has said, "In many cases it can be identified; but the principle applies equally, whether it can be identified or not. The true reason, as said by Lord Mansfield, is that it has passed in *currency*."[2] It was, no doubt, due to the necessities of the commercial world that money, as the medium of exchange, was given this character of currency, and when each variety of commercial paper, in consequence of the demands of commerce, was adopted as a representative of money, the same character was given to it by judicial legislation or legislative enactment.[3] This characteristic is possessed by all classes of

[1] Miller *v.* Race, 1 Burr. 452: Golightly *v.* Reynolds, Lofft. 88; Glyn *v.* Baker, 13 East, 510: Wookey *v.* Pole, 4 B. & Ald. 1; Le Breton *v.* Pierce, 2 Allen, 14.

[2] 2 Parsons' Notes and Bills, 110. "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said, 'that the reason why money cannot be followed is, because it has no earmark;' but this is not true. The true reason is, upon account of the currency of it; it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in currency, an action may be brought for the money itself." Lord Mansfield in Miller *v.* Race, 1 Burr, 452, 457.

[3] See *post*, §§ 10–35, for a full discussion of the negotiability of commercial paper.

commercial paper, and constitutes its primal differentiation from other instruments of indebtedness.

§ 2. **Bills of exchange.** — A bill of exchange is an unconditional written order by one person on another, directing him to pay to a third person or to his order, or to the bearer, the sum of money therein named.[1] He, who draws the bill is called the drawer, the person on whom it is drawn, the drawee, and the one in whose favor it is drawn, to whom or to whose order the money is to be paid, the payee. Until the drawee agrees to honor the bill, he is under no obligation to the payee or holder. But when he accepts it, he binds himself to pay the sum of money called for by the bill.[2] The name "bill of exchange," is adopted from the French "billet de change," and indicates very palpably the object of the paper, viz.: the exchange or transfer of money from one person to another. It is not known very definitely, when bills of exchange first came

[1] Mr. Daniels defines a bill of exchange as "an open letter addressed by one person to a second, directing him, in effect, to pay absolutely and at all events, a certain sum of money therein named, to a third person or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself." 1 Daniel's Negotiable Instruments, 35. Blackstone's definition is "an open letter of request from one man to another, desiring him to pay a sum of money therein named to a third person on his account." 2 Black. Com. 466. "A bill of exchange is an unconditional written order from A. to B., directing B. to pay C. a sum of money therein named." Byles on Bills (6th Am. ed.) 1. "A bill of exchange is a written order of request, * * * for the payment of money absolutely and at all events." Bayley on Bills, 1. Bayley's definition was adopted by Kent and Story. But Judge Story, while commending the definition, says: "But here again its peculiar distinguishing quality, in modern times, its negotiability, is omitted, which, although not by our law essential to the instrument, is still that which, practically speaking, among merchants, constitutes its true character." Story on Bills, § 3. The same may be said of all the definitions cited here. But they will not for that reason, be misleading, if this general characteristic of commercial paper is kept in mind."

[2] See *post*, chapter on acceptance.

into use. Certain passages in the writings of Isocrates and Cicero have been supposed to indicate that they were in use among the Greeks and Romans. It is certain that on one occasion, at the request of Cicero, one of his friends in Rome, who had money payable to him in Athens, directed his Athenian debtor to pay a sum of money to Cicero's son. It is extremely likely that such orders were used in commerce even at a much earlier day. But it is very properly observed that these orders did not resemble, nor did they have the distinguishing characteristics of, the modern bill of exchange.[1]

It is not definitely known at what period the modern bills of exchange were first used in commerce, but it will be safe to say that they were already in use in the thirteenth and fourteenth centuries. Mr. Parsons says: "Bills of exchange, which at first were not, so far as our evidence extends, negotiable, were in use in Venice in 1272, for a law of that date refers to them. There are traces of them a little earlier; and the different theories which ascribe their origin — always on some, but never on certain, evidence — to the Jews when oppressively expelled from their homes, to the Lombards when driven from one country to another for usury, or to the Guelphic Florentines when exiled from Italy by the Ghibellines, all concur in proving that they were in use among the commercial nations of Europe, and especially along the shores of the Mediterranean, about five centuries ago, and that they were then of recent introduction." [2] It is claimed

[1] 3 Kent Com. 44; Story on Bills, § 6, *n.* 4; Pothier de Change, *n.* 6; 1 Daniel's Negotiable Instruments, 4, 5; 1 Parsons' N. & B. 1, 2.

[2] 1 Parsons' N. & B. 2. "This method is said to have been brought into general use by the Jews and Lombards when banished for their usury and other vices, in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236

that Edward I., of England, in 1307, prohibited the transportation of money collected in England for the pope, and directed the payment to be made by way of exchange "*per viam cambii.*" [1] And it is further claimed that bills of exchange were employed by King John in 1202, in order to make remittances to his agents at Rome.[2] But this question is not possessed of any practical value, beyond its historical interest, and with this general statement it will be dismissed from consideration.[3]

§ 3. **Foreign and inland bills.**— A bill of exchange is said to be foreign, when it is drawn in one country and made payable in another. It is inland, when it is both drawn and made payable in the same country. A bill is not foreign because parties to it reside in different States. If the drawer and drawee live in different States, and the bill is payable in the same State in which it is drawn, it is an inland bill, notwithstanding the difference in the residence of parties.[4] And if the parties reside in the same State, but the bill is drawn in one State and made payable in another State, it

the use of paper credit was introduced into the Mogul Empire in China." 2 Black. Com. 467. Chitty says: "Other authors have attributed the invention to the Florentines when, being driven out of their country by the faction of the Gebelings (Ghibellines), they established themselves at Lyons and other towns. On the whole, however, there is no certainty on the subject, though it seems clear foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period; and an inference drawn from the statute, 5 Rich. II. St. 1, ch. 2, warrants the conclusion that foreign bills were introduced into this country previously to the year 1381." Chitty on Bills, 11.

[1] Anderson on Commerce, vol. I., pp. 373, 374, quoted in 1 Parsons' N. & B. 4.

[2] Macpherson's Annals of Commerce, vol. I., p. 367, quoted in 1 Parsons' N. & B. 4.

[3] See Kent's Com. 71, 72; Chitty on Bills 10, 11; Story on Bills, §§ 5–11; Montesquieu Spirit of Laws, B. xxi., ch. 20; Hallam's Ints. to Lit. of Europe, vol. I., p. 68; Smith's Wealth of Nations, vol. I., p. 38.

[4] Amner *v.* Clark, 2 Cromp. M. & R. 468.

is a foreign bill.[1] Inasmuch as the demands of commerce were different in the two cases, inland bills came into use at a much later day than did foreign bills, and in England they were first used about the reign of Charles II.[2] Originally there were many differences recognized by the law between foreign and inland bills,[3] but at the present day there are but two important differences. One is, that where a bill is foreign, its construction and interpretation are governed by the law of the place where it is to be paid, while in respect to an inland bill, being payable at the same place at which it was drawn, it is controlled by the law of that place.[4] The second difference is, that for reasons given and explained elsewhere[5] it is necessary to protest a foreign bill for non-payment, in order to hold the drawer and indorsers liable, but it is not necessary to protest inland bills. In determining, whether bills are foreign or inland, Ireland is held by the English courts to be foreign to England, where a bill is drawn in Ireland and payable in England.[6] And so also in this country are the States, which constitute the United States, considered so far foreign to each other that a bill is held to be foreign, which is drawn in one State and made payable in another.[7] A bill purporting on its face to be a foreign or

[1] Buckner *v.* Finley, 2 Pet. 586.

[2] 1 Daniel's Neg. Instruments, 8; Chitty on Bills *21.

[3] It had to be shown specially that the use of inland bills was customary in the towns in which the parties lived. Butler *v.* Crips, 6 Mod. 29; Pinkney *v.* Hall, Ld. Raym. 175; Chitty on Bills, *11, 12. And, at first, the custom was only recognized and enforced between merchants. Bromwick *v.* Lloyd, 2 Lutw. 1585; Sarsfield *v.* Witherly, Carth. 82.

[4] See subsequent chapter for a full discussion of the conflict of law in respect to commercial paper.

[5] See *post*, chapter on Protest.

[6] Mahoney *v.* Ashlin, 2 B. & Ad. 478.

[7] Buckner *v.* Finley, 2 Pet. 586; Lonsdale *v.* Brown, 4 Wash. C. C. 86, 153; Warren *v.* Coombs, 20 Me. 139; Ticonic Bank *v.* Stackpole, 41 Me. 302; Phœnix Bk. *v.* Hussey, 12 Pick. 483; Carter *v.* Burley, 9 N. H. 558; Wells *v.* Whitehead, 15 Wend. 527; Warder *v.* Arell, 2 Wash. (Va.) 298; Brown *v.* Ferguson, 4 Leigh, 37; Duncan *v.* Course, 3 Const. R. (S. C.)

inland bill, cannot be shown by parol or other collateral evidence to be respectively an inland or foreign bill, to the detriment of third persons who take the bill without any knowledge of its hidden character.[1] But the true character of the bill may be shown, where it will not work a detriment to any party to the bill, particularly when the bill cannot be sued on in its apparent character because of some legal informality.[2] Where the bill does not show on its face that it is a foreign bill, its character must be specially averred, since courts will not take judicial notice of the subdivisions of foreign states. Thus if a bill is drawn in Dublin and made payable in London, the courts will not take judicial notice of the fact that the two places are in different countries.[3]

§ 4. **Sets of foreign bills.** — There is rarely more than one copy made of inland bills; but in consequence of the inconvenience and delay that may be occasioned by the loss of foreign bills, it is the common custom throughout the civilized world for the drawer to issue several copies of the bill, usually three, but sometimes four; and these copies are called in the law a set of exchange, and constitute one bill. So fixed is the custom that it appears to be the right of the purchaser of a foreign bill to have the full set made

100; Donegan *v.* Wood, 49 Ala. 242; Todd *v.* Neale Adm'r, 49 Ala. 266; Carter *v.* Union Bk., 7 Humph. 548; Chenowith *v.* Chamberlain, 6 B. Mon. 60; State Bank *v.* Hayes, 3 Ind. 400. But see Miller *v.* Hackley, 5 Johns. 375.

[1] Smith *v.* Mingay, 1 Maule & S. 87; Sennig *v.* Ralston, 23 Pa. St. 137; Strawbridge *v.* Robinson, 5 Gilman, 470.

[2] Abraham *v.* Dubois, 4 Camp. 269; Jordaine *v.* Lashbrooke, 7 T. R. 601; Steadman *v.* Duhamel, 1 C. B. 888; Bire *v.* Moreau, 2 C. & P. (12 Eng. L. R.) 376.

[3] Kearney *v.* King, 18 E. C. L. R. 28. See also, to the same effect, Riggin *v.* Collier, 6 Mo. 568; Cook *v.* Crawford, 4 Texas, 420; Andrews *v.* Hoxie, 5 Texas, 171; Yale *v.* Wood, 30 Texas, 17.

out for him, containing the usual number of parts.[1] It is also the custom, for the protection of the drawer, and to give notice to all purchasers of the connection between the several parts, to make in each part a reference to the other parts, for example: "Pay to my first exchange, the second and third remaining unpaid;" or "pay this second exchange, the first and third remaining unpaid," etc. If some such clause were not inserted, the drawer might be held liable upon more than one part by their transfer to innocent purchasers.[2] Either part may be negotiated, and when any one of the parts is accepted and paid, all the others are extinguished, even in the hands of subsequent purchasers, without actual notice of the negotiation of the other part.[3] It is the duty of a purchaser of a foreign bill to inquire after the other parts which are missing, and he cannot therefore be an innocent purchaser where one of the parts has been already negotiated.[4] Since any one of the parts may be negotiated, the party entitled to the bill should demand the delivery of all the parts to him, and can compel their delivery to him, even from a *bona fide* holder, who subsequently gets possession of one of the parts.[5] But the holder or indorser who thus fraudulently sells two parts to different purchasers, will be held liable to both of them.[6]

[1] 1 Parsons' N. & B. 58–60; Story on Bills, § 66; Kearney *v.* West Granada Mining Co., 1 H. & N. 412; Daniel's Neg. Instruments, 121; Byles on Bills, 577–581.

[2] 1 Parsons' N. & B. 59; Byles on Bills, 579; 1 Daniel's Negotiable Instruments, 122; Davison *v.* Robertson, 3 Dow. 218.

[3] Holdsworth *v.* Hunter, 10 B. & C. 449; Miller *v.* Hackley, Anthon, 68; Durkin *v.* Cranston, 7 Johns. 442; Wells *v.* Whitehead, 15 Wend. 527; Ingraham *v.* Gibbs, 2 Dallas, 134; Kenworthy *v.* Hopkins, 1 Johns. Cas. 107.

[4] Lang *v.* Smyth, 7 Bing. (20 E. C. L. R.) 284–294.

[5] Penard *v.* Klochman, 32 L. J. Q. B. 83; *s. c.* 3 Best & Smith (113 E. C. L. R.) 388; Holdsworth *v.* Hunter, 10 B. & C. 449; Pereira *v.* Jopp, cited in 10 B. & C. 450, note *a*.

[6] Hodsworth *v.* Hunt, 10 B. & C. 449.

It is said to be the custom in continental Europe, particularly in France, to send on the original bill to the drawee for his acceptance, while a copy is being negotiated.[1] But the custom is not recognized in the United States, or in England.[2] The drawee should accept but one of the parts, and pay the bill, only upon presentation of the part which he accepted. His acceptance of more than one part would render him liable on both parts, if they were transferred to different innocent holders; and if he should pay the bill upon the presentation of the part which had not been accepted, he may well be held liable on presentation of the part which he had accepted.[3] In any suit upon the bill against the drawer or indorser, the part which had been protested must be produced in evidence.[4] A copy of the bill may be protested, instead of the original;[5] and while there is some authority for claiming that in an action against the drawer or indorser all of the set must be produced, or their absence satisfactorily accounted for,[6] the better opinion seems to be that this is not necessary. If the original or another copy had been previously negotiated or paid, the burden of proving this, is thrown upon the defense.[7]

§ 5. **The effect of a bill of exchange.**[8] — It is the common understanding, and usually it is the fact, that when

[1] 1 Daniel's Neg Inst. 122; Byles on Bills, 580.

[2] 1 Parsons' N. & B. 60.

[3] Byles on Bills, 579, 580; Holdsworth *v.* Hunter, 10 B. & C. 449; Wright *v.* McFall, 8 La. Ann. 120.

[4] Johnson *v.* Offut, 4 Met. (Ky.) 19; Wells *v.* Whitehead, 15 Wend. 527; 3 Kent's, Com. 109.

[5] Dehers *v.* Harriot, 1 Show. 163; 1 Parsons' N. & B. 60; Byles on Bills, 580.

[6] See Daniel's Neg. Inst. 123.

[7] Downes *v.* Church, 13 Pet. 205; Commercial Bank *v.* Routh, 7 La. Ann 128.

[8] See chapter on checks for a discussion of the question whether a check operates as an equitable assignment *pro tanto* of the fund on deposit.

one person draws a bill of exchange upon another, in favor of a third party, the drawee has funds belonging to the drawer, or he is indebted to the drawer, in amount sufficient to cover the sum of money called for by the bill. The bill is received by the payee in reliance upon the supposed fact, although it is not necessary to the validity of the bill and the obligation of the drawee, if the drawee has accepted it. When the drawee has accepted unconditionally, his obligation to pay is absolute and not at all dependent upon his possession of funds belonging to the drawer. But cases may and often do arise, in consequence of the insolvency of the drawer or drawee, or of both, the only available remedy for the payee or holder of the bill is to seize hold of the funds or debt, against which the bill was supposed to have been drawn, and secure its appropriation to the satisfaction of the bill. But in order that this end may be attained, it is necessary to show that a bill of exchange operates as an assignment *pro tanto* of the fund or debt against which it was drawn. Until very lately modified by statute, it has been the invariable common-law rule that no *chose in action* may be assigned, it being supposed to be contrary to public policy to permit such assignments.[1] And this rule has in form been strictly enforced in all courts of law, wherever it has not been repealed by statute, up to the present day. But courts of equity have for a long time disregarded the rule in its application to cases over which they could acquire jurisdiction, recognized the right of the assignee of a *chose in action* to sue on it in his own name, whenever the action could be main-

[1] Lord Coke says: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, title, right nor thing in action shall be granted to strangers, for that would be the occasion of multiplying contentions and suits of great oppression of the people, and chiefly of terre tenants, and subversion of the due and equal execution of justice." Lampet's Case, 10 Rep. 48.

tained in an equity court, and compelled the assignor by injunction to permit the assignee to bring in the former's name whatever suit at law may be necessary for the attainment of his rights. In consequence of this common-law prohibition, it would be impossible to show that the bill of exchange operated as a legal assignment of the indebtedness, against which it was drawn.[1] The most that can be claimed for it, in those States in which this common-law rule has not been abrogated, is that it is an equitable assignment of the fund or debt.

§ 5a. **Bill of exchange for a part of fund.** — All the cases agree in stating that a bill of exchange, drawn for a part of a debt due to the drawer by the drawee, will not operate as an equitable assignment *pro tanto* of that debt, at least as against the drawee, unless he has accepted; the principal reason for the conclusion being that a different rule would enable a creditor to harass and increase the burden upon his debtor, by splitting up one indebtedness into many distinct debts, with independent rights of action. And this the law does not permit, except with the consent of the debtor. By accepting the bill of exchange for a part of the debt, the drawee gives his assent to this increase of the burden.[2] But if this be the only objection

[1] "It is clearly settled that no action at law will lie in favor of the holder of a bill of exchange against the drawer, unless he accepts the bill." Ruggles, J., in Harris *v.* Clark, 3 Comst. 117. "There is no such privity between him (the drawee) and the holder as can entitle the latter to maintain an action against him." Duer, J., in N. Y., and Va. State Bk. *v.* Gibson, 5 Duer, 574. See, also, Tiernan *v.* Jackson, 5 Pet. 580; Yates *v.* Bell, 3 B. & Ald. 643; Williams *v.* Everett, 14 East, 582.

[2] "The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the consent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments to which it may be

to the construction that an unaccepted bill of exchange for a part of a debt or fund operates as an equitable assignment *pro tanto*, the objection only holds good in favor of, and as against, the drawee; and if the entire debt or fund is brought into court in an equitable proceeding, to which all the persons interested have been made parties, there can be no reason why the bill should not be declared to be an equitable assignment *pro tanto* of the fund or debt, as against the drawer and his privies.[1]

§ 5*b*. **Bill of exchange for whole of fund.** — So, also, if there were no other objection to the assignment theory,

broken into fragments. When he undertakes to pay an integral sum to his creditors, it is no part of his contract that he shall be obliged to pay in fragments to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit." Story, J., in Mandeville *v.* Welch, 5 Wheat. 277. See to the same effect, Harris *v.* Comstock, 3 N. Y. 115, 116; Robins *v.* Bacon, 3 Greenleaf, 346; Gibson *v.* Cooke, 20 Pick. 15; Cowperthwaite *v.* Sheffield, 1 Sandf. 416; Gibson *v.* Finley, 5 Md. Ch. 75; Hopkins *v.* Beebe, 2 Casey, 85; Poydras *v.* Delamere, 13 La. (O. S. 1838) 98; Weinstock *v.* Bellwood, 12 Bush, 139; Christmas *v.* Russell, 14 Wall. 84; Noe *v.* Christie, 51 N. Y. 273; Shaver *v.* West. U. Tel. Co., 57 N. Y. 461; Att'y-Gen. *v.* Continental Life Ins. Co., 71 N. Y. 325; Bull *v.* Tuttle, 81 N. Y. 457; Chase *v.* Alexander, 6 Mo. App. 506.

[1] Mr. Daniel says that such a bill or order "for a part of a fund does operate as an equitable assignment *pro tanto* as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his whole debt in its entirety at once. But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee." 1 Daniel Negot. Inst. 26. See to the same effect, Story Eq. Jur., § 1044; 3 Lead. Cas. in Equity, 356; Field *v.* Mayor of N. Y., 2 Seld. 179; Poydras *v.* Delamere, 13 La. 98.

it must be concluded, that an unaccepted bill of exchange for the whole of the fund or debt, makes an equitable assignment of the fund or debt, not only against the drawer, but also as against the drawee, and such is the conclusion of many of the courts.[1] But there are very many cases to the contrary. Some of them rest their ob-

[1] "It seems to be equally well settled that a draft by the creditor on his debtor in the form of a bill of exchange for the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debt or fund." Dewey, J., in Gibson *v.* Cooke, 20 Pick. 15. "If the drawee refuse to accept and pay the bill, the right of the holder to the debt once assigned to him is not thereby impaired; although he may not be entitled to recover the same in his own name, for the want of a promise to pay. But he may sue the drawer, or the drawee in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a *chose in action* that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence that the amount has not been paid by the drawer or by any of the indorsers. I see no possible mischief which can result from this doctrine. For if after payment refused and protest made, the drawee should pay over the funds in his hands to the drawer or to his order, without notice from the first assignee, that he should retain the bill, and look to him for the amount, so far as he was bound to pay; this would be a good defense against a suit brought in the name of the drawer." Washington, J., in Corser *v.* Craig, 1 Wash. C. C. 426, in which suit was brought against the drawee by the payee and drawer, for the benefit of the indorsee. In Wheatley *v.* Strobe, 12 Cal. 97, the right of the holder of a bill to the fund, against which the bill was drawn, was asserted and recognized as against the attaching creditors of the drawer. Field, J., said: "The want of a written acceptance does not affect the right of Howell (the holder) to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. Under the old common-law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. Courts of law, equally with courts of equity gave effect to assignments like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee." See also Roberts *v.* Austin, 26 Iowa, 315; Robins *v.* Bacon, 3 Greenleaf, 349; Kahnweiler *v.* Anderson, 78 N. C. 137.

jection to the theory on the ground that the bill of exchange does not necessarily contemplate the assignment of the drawer's claim against the drawee, although the acceptance and payment of the bill by the drawee will extinguish his indebtedness to the drawer.[1] But it is conceded that a bill of exchange may be received as evidence of an intention to make an assignment, and it will be permitted to operate as such, if the intention is clearly proven.[2] It has even been said that "a proper bill of exchange does not of itself operate as an assignment to the payee of funds of the drawer, in the hands of the drawee, and even after an unconditional acceptance, it cannot in strictness be held to have that effect, since the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds on his hands."[3] But the courts, and law writers generally, maintain that the bill of exchange does operate as an assignment of the fund, as soon as it is accepted by the drawee.[4]

There is some historical authority for the position that the parties to the bill of exchange do not contemplate

[1] "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears can amount to an equitable assignment of the debt. The note might have been indorsed to any individual, or to any number of people, who might have indorsed it in succession. A mercantile instrument it is in its original, and in that shape it remains, and has no other validity or effect; and to call it an assignment of a debt would be to call it not by its right name." Bacon, V. C., in Shand *v.* DeBuisson, L. R. 18 Eq. 283. See, to the same effect, Bank of Commerce *v.* Bogy, 44 Mo. 17; First N. B. *v.* Dubuque, S. R. R. Co., 52 Iowa, 378 (35 Am. Rep. 281); Harrison *v.* Williamson, 2 Edw. Ch. 438.

[2] First Nat. Bk. *v.* Dubuque, S. R. R., 52 Iowa, 378 (35 Am. Rep. 281); Bank of Commerce *v.* Bogy, 44 Mo. 17.

[3] Hurlbut, J., in Cowperthwaite *v.* Sheffield, 3 Comst. 243. See also Marine & Fire Ins. Bk. *v.* Jauncey, 3 Sandf. 258; Wheeler *v.* Stone, 4 Gill, 47.

[4] Mandeville *v.* Welch, 5 Wheat. 277; Harris *v.* Clark, 3 Const. 243; Buckner *v.* Sayre, 17 B. Mon. 754; First Nat. Bk. *v.* Dubuque, S. R. R., 52 Iowa, 378 (35 Am. Rep. 281); Lambert *v.* Jones, 2 Patton & H. 144; 2 Parsons' N. & B. 330, 381; Story on Bills, § 13.

an assignment of the fund or debt, against which the bill is drawn, in the fact that for many years, after the legal recognition of bills of exchange, assignments of choses in action were illegal in equity, as well as in law. There can be no doubt that at that time the bill must have been considered inchoate, until it was accepted, and when accepted it partook of the character of a novation. The drawee was released *pro tanto* of his indebtedness to the drawer upon his acceptance of the bill, which obligated him to pay a like sum to the holder of the bill. In some respects, an accepted bill of exchange is a novation, a mercantile transaction that was ancient, when bills of exchange first came into use. The new and necessary additional characteristics of the bill were its assignability and negotiability. In all innovations upon existent rules of law the conservatism of jurisprudence compels a conformity of the new rule to the established rules as nearly as this is possible. It is therefore unreasonable to claim that originally bills of exchange could have been looked upon as equitable assignments of the fund or debt, against which they were drawn. And it is, without doubt, the influence of the common-law rule against the assignment of choses in action, which more than anything else militates against the present application of the theory of assignment to accepted bills of exchange drawn for the whole of the fund or debt, although that rule has been very generally repealed by statute or nullified by the rules of equity.[1] But this historical reason does not furnish any substantial objection to the theory at the pres-

[2] In Johnson *v.* Collins, 1 East, 104, which was an action brought by the indorsee of a bill of exchange drawn on the promise of a debtor to accept it, Kenyon, J., said: "If we were to suffer the plaintiff to recover on the general counts, we must say that a *chose in action* is assignable, a doctrine to which I never will subscribe." In the same case, Grose, J., said that "to permit the plaintiff to recover would virtually be making all choses in action assignable."

ent time. Since the common-law rule which constituted the obstacle to its adoption has been abrogated, the manifest value of the theory, in protecting the just rights of the payee or holder of the bill, is a sufficient justification of its adoption by the courts.

§ 5c. **Bill of exchange not drawn on a particular fund.** — A still further objection to the theory that a bill of exchange operates as an equitable assignment *pro tanto* of the fund, lies in the statement that an assignment, to be valid, must relate to a specific debt or thing in action; and that since the bill of exchange is not drawn on a particular or specific fund it cannot have the effect of an assignment.[1] It is very generally conceded by the courts that an order for an entire debt or fund, in which the debt or fund is specified or named, operates as an equitable assignment thereof, and binds the drawee as soon as he has received notice.[2] And in order that such an order may operate as an assignment, it is not necessary that the debt or fund should be in existence, or matured, when the order was given.[3] The only difference, in form or in effect, between bills of exchange and these orders, which have been judicially declared to be equitable assignments, is the

[1] In Lloyd et al. *v.* McCaffrey, 46 Pa. St. 410, Justice Strong said: "It cannot be maintained that Taylor's check, without more, amounted to an equitable appropriation of the funds in the hands of the banker to whom it was addressed. To make an order or draft an equitable assignment it must designate the fund upon which it is drawn." See, to the same effect, Phillips *v.* Stagg, 2 Edw. Ch. 108; Harrison *v.* Williamson, 2 Edw. Ch. 430; Chapman *v.* White, 6 N. Y. 412.

[2] Row *v.* Dawson, 1 Ves. 331; Lett *v.* Morris, 4 Sim. 607; Ex parte South, 3 Swanston, 391; Yeates *v.* Groves, 1 Ves. Jr. 281; Christmas *v.* Russell, 14 Wall. 84; Brill *v.* Tuttle, 81 N. Y. 457; Ehrichs *v.* De Mill, 75 N. Y. 370; Parker *v.* Syracuse, 31 N. Y. 376; Lowery *v.* Steward, 25 N. Y. 241.

[3] Row *v.* Dawson, 1 Ves. 331; Peyton *v.* Hallett, 1 Caines, 363; Cutts *v.* Perkins, 12 Mass. 206; Brill *v.* Tuttle, 81 N. Y. 547; Brooks *v.* Hatch, 6 Leigh, 534.

fact that the latter are drawn against a particular or specific fund. But this does not appear to be a valid objection to the application of the theory of assignment to bills of exchange, at least in equity. In equity an assignment will be valid whenever the thing assigned is capable of identification; it matters not whether it be in existence at the time of assignment, or is only a future possibility or expectancy. "To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of *choses in action*, and of contingent interests and expectancies, but also of things which have no actual or potential existence and rest in mere possibility; not, indeed, as a present positive transfer, operative *in præsenti*, for that can only be of a thing *in esse*, but as a present contract to take effect and attach as soon as a thing comes *in esse*." [1] The uncertainty of the fund or debt would, therefore, be no ground of objection to the consideration of a bill of exchange as an equitable assignment, if the parties intended it to have that effect. The fact that it is drawn against a particular debtor, would seem to be a sufficient particularization of the fund or debt, in order to work an equitable assignment. In one of the cases [2] an order, payable "out of the first money which should be due him (the drawer) for salt delivered or to be delivered, to them (the drawees)," was held to operate as an equitable assignment *pro tanto*. If this case is sustainable, and it is in the direct line of the authorities already cited,[3] it is difficult to see why an order would not operate as an equitable assignment, which was "payable out of the first money due the drawer by the drawee; and this is the practical, as well as legal, effect of all bills of exchange.

[1] Story's Eq. Jur., § 1040.

[2] Brooks *v.* Hatch, 6 Leigh, 534; See Harvin *v.* Galluchat, 28 S. C. 211.

[3] See *ante*, p. 12, note 2, and p. 13 n. 1.

The general description of credits in assignments for the benefit of creditors never invalidates the assignment, or affects the assignee's right to them. But since the bill of exchange is at best only an equitable assignment, and the thing assigned being identified simply as the indebtedness of the drawee to the drawer, it can only be treated as an effective assignment, while the means of identification are at hand. Should the fund or debt be innocently (*i.e.*, as to the drawee) paid over to the drawer or his assigns, it loses its identity, — unless the identical money can be traced and discovered in the hands of the drawer or of his assignee, — and the bill may thus be deprived of its value as an assignment.[1]

§ 6. **Promissory note, what is.** — A promissory note is an unconditional promise to pay to another's order or to bearer a specified sum of money at a specified time. The person who executes the note is called the maker, and he to whom it is made payable is called the payee. It is not known positively when promissory notes, as commercial or negotiable paper, were first recognized by the courts. It cannot be doubted that as ordinary obligations to pay money they must have been used generally in all ages and in all parts of the world where commerce thrived at all. But it is quite certain that they did not possess the quality of negotiability, until foreign bills of exchange had been for some time in use and had acquired their negotiable character.[2] But when inland bills of exchange were introduced into commerce, promissory notes, with the claim for them of negotiability, also appeared, and in many of the cases of that period they were confounded

[1] See Row *v.* Dawson, 1 Ves. Sr. 331; Cowperthwaite *v.* Sheffield, 3 Comst. 243.

[2] 1 Parsons' N. & B. 11; Story on Notes, § 6; 1 Daniel on Negot. Inst. 6.

with inland bills, the courts, as well as the merchants, failing to distinguish between them.[1] In all of the early cases the question appears not to have been whether a promissory note was of itself negotiable, but whether it partook of the character of a bill of exchange, sufficient to support a declaration upon the custom of merchants in respect to bills of exchange. In Buller *v.* Crips,[2] the action was upon a promissory note by the indorsee against the maker, and the plaintiff declared upon the custom of merchants, as upon a bill of exchange. On a motion in arrest of judgment, Lord Holt declared promissory notes to be different from bills of exchange, and was therefore not negotiable. He said: "The notes in question are only an invention of the Goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty; and besides, it would empower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange, for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and likewise it hinders the exportation of money out of the realm."[3] This discussion

[1] In Grant *v.* Vaughan, 3 Burr. 1525, Lord Mansfield said: "Upon looking into the reports of the cases on this head in the times of King William III. and Queen Anne, it is difficult to discover by them when the question arises upon a bill, and when upon a note; for the reporters do not express themselves with sufficient precision, but use the word 'note' and 'bill' promiscuously." See also Clerke *v.* Martin, 2 Ld. Raym. 757.

[2] 6 Mod. 29.

[3] In another case, Clerke *v.* Martin, 2 Ld. Raym. 757; 1 Salk. 129, 363, Lord Holt said, "that the maintaining of these actions upon such notes were innovations upon the rules of the common law, and that it amounted to the setting up a new sort of specialty unknown to the

was finally set at rest by the enactment of the statutes 3 and 4 Anne, chapter 9, and 7 Anne, chapter 25, which provided that promissory notes shall be negotiable in the same manner as inland bills of exchange.[1] Similar statutes have been enacted in all of the States of the Union, so that it is not likely to be a very important question, whether promissory notes were negotiable before the statute of Anne, or are negotiable independently of that or a similar statute. But where the statute prescribes different criteria for the determination of what are negotiable notes from what are prescribed by the statute of Anne, and the maker of the note has not conformed to the statutory requirements, it becomes exceedingly important to know

common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall." That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general *indebitatus assumpsit* for money sent, etc.

[1] The statute 3 and 4 Anne, ch. 9, provides, "that all notes in writing that shall be made and signed by any person, etc., whereby such person, etc., shall promise to pay to any other person, his, her, or their order, or unto bearer, any sum of money mentioned in any such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, etc., to whom the same is made payable; and also every such note payable to any person, etc., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the persons, etc, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they, might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, etc., who signed the same; and that any person, etc., to whom such note that is made payable to any person, etc., his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person, etc., who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange."

whether promissory notes are negotiable independently of any statute. It seems to be the better opinion that promissory notes were by customary law made negotiable, like inland bills of exchange, before the enactment of the statute of Anne, and that the statute was designed to declare what was understood to be the existing law, and to correct the error on this point brought about by Lord Holt's persistent opposition to the recognition of promissory notes as negotiable paper.[1] But on the other hand, it has been held that notes were not negotiable, until made so by the statute of Anne.[2]

§ 7. **Transfer by indorsement.** — When a bill or note is made payable to one or his order, as a consequence of the recognized negotiability of such bill or note, it has become the rule, notwithstanding the general prohibition of the assignment of choses in action, that all the rights of the payee in the bill or note may be transferred to another by an indorsement of it to him. Indorsement is a word compounded of the Latin words, *in dorsa*, meaning on the back; and indorsement consists of a writing on the back of the bill or note, directing the payment of the bill or note to another. The payee or transferer of the bill or note is called the indorser, and the transferee is called the indorsee. It has also become a rule of the law merchant that each successive indorser guarantees to the subsequent indorsees the payment of the bill or note by the maker or drawee. This general statement of the subject of indorse-

[1] "These notes were, at the time the statute was made, negotiable by the law merchant of England, which was and is as much as part of the law of England as — to use the strong language of Christian — the laws relating to marriage or murder." 1 Parsons' N. & B. 13. See, to the same effect, Edwardson Bills, 51, 52; Irwin *v.* Maury, 1 Mo. 194; Dunn *v.* Adams, 1 Ala. 527.

[2] Eaton *v.* Lennox, 5 Rand. 31; Davis *v.* Miller, 14 Gratt. 18; Morton *v.* Rose, 2 Wash. (Va.) 233.

ment is introduced here for the purpose of explaining terms, and the subject of indorsement will receive an exhaustive treatment elsewhere.[1]

§ 8. **Construction of ambiguous instruments.** — If the form and language of a paper be so ambiguous, that it is impossible to ascertain whether it was intended to be a bill of exchange, or promissory note, the holder is permitted to treat it as either a bill or note.[2] The courts will presume that the instrument was drawn in that ambiguous form, in order that it may be sued on in either character.[3] In one of the cases cited,[4] the paper was in this form: —

"£44, 11s. 5d. LONDON, 5th August, 1833.

"Three months after date, I promise to pay Mr. John Bury, or order, forty-four pounds, eleven shillings and five pence. Value received.

"J. B. GRUTHEROT. "JOHN BURY.

"35 Montague Pl., Bedford Place."

Grutherot's name was written across the face as an acceptance, and Bury's name on the back as an indorsement. It was held that it could be sued on either as a bill or as a note.[5] The same conclusion has been reached in other

[1] See *post*, chapter on Transfer by Indorsement.

[2] "Equivocal instruments of this kind, possessing the character both of promissory notes and bills of exchange, may be treated as either." Crompton, J., in Lloyd *v.* Oliver, 18 Q. B. (83 E. C. L. R.) 471. See, to the same effect, Edis *v.* Bury, 6 Barn. & Cres. (13 E. C. L. R.) 433; Block *v.* Bell, 1 M. & R. 149; Brazelton *v.* McMurray, 44 Ala. 323.

[3] "It is not unjust to presume that it was drawn in this form, for the purpose of suing upon it either as a promissory note or as a bill of exchange." Erle, J., in Lloyd *v.* Oliver, 18 Q. B. (83 E. C. L. R.) 471.

[4] Edis *v.* Bury, 6 Barn. & Cres. (13 E. C. L. R.) 433.

[5] "Until Grutherot put his name to this instrument it was clearly in terms a promissory note, and having been once such, the fact of his having afterward put his name to it as acceptor, cannot alter the nature of it." Holroyd, J., in Edis *v.* Bury, *supra*.

cases, where the body of the paper was in the form of a promissory note, and yet there was appended an address to a supposed drawee, and an acceptance by him.[1] But where the instrument is in every other respect of the form of a bill of exchange, except that in the address of the drawee "at" is used instead of "to," for example, "at John Smith & Co.," it is held that the variance from the common form is not sufficient to constitute an ambiguity: and, hence, such instrument must be sued on as a bill of exchange.[2]

[1] Block *v.* Bell, 1 M. & R. 149; Lloyd *v.* Oliver, 18 Q. B. (83 E. C. L. R.) 471.

[2] Shuttleworth *v.* Stevens, 1 Camp. 407; Allan *v.* Mawson, 4 Camp. 115; Rex *v.* Hunter, Russ. & Ry. C. C. 511; 1 Daniel Negot. Inst., § 133.

CHAPTER II.

THE REQUISITES AND COMPONENT PARTS OF BILLS AND NOTES.

SECTION 10. The date.
11. Antedating and post-dating.
12. Name of drawer and maker.
12*a*. The form and place of signature.
13. Joint and several notes.
14. Two or more drawers.
15. Name of the drawee.
16. Address to drawees in the alternative.
17. Designation of the payee.
18. Joint and alternative payees.
19. Fictitious or non-existing parties — adopted names.
20. Same person as different parties.
21. Words of negotiability.
22. Note made negotiable at particular bank.
23. A distinct obligation to pay.
24. Time of payment.
25. Payment must be unconditional.
25*a*. Payment on or before a certain date.
25*b*. Payment when convenient or possible.
25*c*. Payment on return of note.
25*d*. Payment in default of installment.
26. Payment out of a particular fund.
27. Words of advice.
28. Certainty as to amount to be paid.
28*a*. Payable with exchange.
28*b*. Stipulations to pay costs for collection.
29. Payment in money only.
29*a*. Payable in bank bills or currency.
29*b*. Payable in foreign money.
29*c*. Payable in money of Confederate States.
29*d*. Denomination stated in body of paper.
29*e*. Collateral obligations.
30. Place of payment.
31. Acknowledgment of consideration.
32. Sealed instruments not commercial paper.
33. Attestation by witness.

SECTION 34. Delivery.
34*a*. Delivery to whom.
34*b*. Time of delivery.
34*c*. Delivery on Sunday.
34*d*. Delivery as an escrow.
35. Bills and notes executed in blank.

§ 10. **The date.** — It has been very generally held that the date is not essential to the validity of a bill or note.[1] But while it may not be essential to a bill or note, which is made payable at sight, on demand or on a certain day, it would seem to be indispensable in a note or bill, payable at a certain time after date, for it would otherwise be impossible to tell from the face of the paper, when the money was due and payable.[2] But it seems to be considered non-essential, even in this case, and if the date is not given, the time will be computed from the day of issue.[3] Parol evidence is admissible to show from what time an undated paper is intended to operate.[4] If the day of delivery is not known, or cannot be proven, the time may be computed from the earliest day on which it is proven to have been in the hands of the payee or any subsequent holder.[5] It is also admissible to show a mistake in

[1] Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Drake *v.* Rogers, 32 Me. 524; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. 337; Cowing *v.* Altman, 71 N. Y. 441; Lean *v.* Lozardi, 27 Mich. 424; Seldenridge *v.* Connable, 32 Ind. 375; Richardson *v.* Ellett, 10 Texas, 190; Wexel *v.* Cameron, 31 Tex. 614; De la Courtier *v.* Bellamy, 2 Show. 422; Giles *v.* Bourne, 6 Maule & S. 73; Davis *v.* Jones, 17 C. B. (84 E. C. L. R.) 625; *s. c.* 25 L. J. C. P. 91.

[2] See 1 Daniel's Neg. Inst., p. 93.

[3] 1 Parsons' N. & B. 552; De la Courtier *v.* Bellamy, 2 Show. 422; Giles *v.* Bourne, 6 Maule & S. 75; Cowing *v.* Altman, 71 N. Y. 441; Seldenridge *v.* Connable, 32 Ind. 375.

[4] Davis *v.* Jones, 17 C. B. (84 E. C. L. R.) 625; *s. c.* 25 L. J. C. P. 91; Cowing *v.* Altman, 71 N. Y. 441; Richardson *v.* Ellett, 10 Texas, 190; Lean *v.* Lozardi, 27 Mich. 424.

[5] Richardson *v.* Lincoln, 5 Met. 201; Woodford *v.* Dorwin, 3 Vt. 82; Clark *v.* Sigourney, 17 Conn. 511.

the date, although proof of the mistake cuts off a defense of the maker;[1] but a different date could not be proven by parol evidence against a purchaser for value, who relied upon the given date.[2] For the purpose of protecting the rights of all parties, a mistaken date may be changed in an equitable action for the reformation of the instrument.[3] When an undated note or bill is executed and delivered to the payee, the presumption of law is that he is authorized by the maker to fill up the date, and the maker will be bound by any date which the payee inserts, at least to an innocent indorsee for value.[4] But he is not permitted to put in any other but the actual date, unless expressly authorized. If, therefore, for the purpose of accelerating the time of payment, he should antedate the paper, it will be void in the hands of all who receive it with notice.[5] The date is usually written in the right-hand corner of the bill or note, at the top; but it matters not in what part of the paper it appears.[6]

§ 11. **Antedating and Post-dating.** — Commercial instruments are frequently antedated and post-dated for the purpose of accelerating or postponing the payment, and for other purposes. And it is not considered a cause for suspicion, if they are negotiated before the day of the date,[7] not even if the indorser should die before the day. The

[1] Drake *v.* Rogers, 32 Me. 524; Germania Bank *v.* Distler, 11 N. Y. S. C. (4 Hun) 633.

[2] Huston *v.* Young, 33 Me. 85.

[3] Paysant *v.* Ware, 1 Ala. 160.

[4] Androscoggin Bank *v.* Kimball, 10 Cush. 373; Mechanics', etc., Bank *v.* Schuyler, 7 Cow. 337.

[5] Goodman *v.* Simonds, 19 Mo. 106. But see Mitchell *v.* Culver, 7 Cow. 336.

[6] Shepherd *v.* Graves, 14 How. 505.

[7] Brewster *v.* McCardel, 8 Wend. 478; Richter *v.* Selin, 8 Serg. & R. 425; McSparran *v.* Neely, 91 Pa. St. 315; Gray *v.* Wood, 2 Har. & J. 328.

indorsee would in such a case acquire the full title of the indorser, and could recover of the maker or drawer.[1] So immaterial to the validity of a note or bill is the date, that while an explanation of the variance would be required in an action on the note or bill, if the date does not correspond with the declaration,[2] it will not be a material variance, if a note is declared to have been *made* on a certain day, different from the date of the paper.[3] As a general rule, the rights of the parties, so far as they are or may be affected by the date, are determined with reference to the actual date the bill or note bears.[4] But if in a post-dated or antedated note or bill, it should appear from the date to have been executed when the maker was incompetent by reason of non-age, insanity or coverture, or that the paper was void for some other circumstance connected with the day of the date, it may be shown in behalf of any of the parties, that the bill or note was actually negotiated at a time when no such objection to its validity existed.[5] On the other hand, if the note or bill should be post-dated or antedated for the purpose of evading the rules of law which invalidated commercial paper made on the day of execution and delivery, proof of the actual day of delivery will make the paper void in the hands of all persons who take it with notice or without consideration.[6]

§ 12. **Name of drawer or maker.** — It is necessary in all legal obligations to know who is the obligor, and particularly in all kinds of commercial paper, since the cer-

[1] Pasmore *v.* North, 13 East, 517; Brewster *v.* McCardel, 8 Wend. 478.

[2] Fitch *v.* Jones, 5 Ellis & B. 238; Fanshawe *v.* Peet, 2 H. & M. 1.

[3] Coxon *v.* Lyon, 2 Camp. 307; Smith *v.* Lord, 2 Daw. & L. 759.

[4] Luce *v.* Shaff, 70 Ind. 152.

[5] Pasmore *v.* North, 13 East, 517; Aldridge *v.* Branch Bk., 17 Ala. 45.

[6] Serie *v.* Norton, 8 M. & W. 309; Bailey *v.* Taber, 5 Mass. 286; Bank *v.* Mayberry, 48 Me. 198; State Bank *v.* Thompson, 42 N. H. 369.

tainty of parties is one of the essentials of that kind of legal instruments. Without a maker, there can, as a matter of course, be no note, for it is his liability alone which gives life to it. The name must appear on the face of the note in such form as to cause no uncertainty as to the person who is to pay. If, therefore, the signature should be in the alternative, as where the signature is, "A. B. or else C. D.," the note would not be good as negotiable paper on account of the uncertainty and variance in the liability of the parties to it.[1] But it would seem that this objection would only go to invalidate the note, so far as the uncertain liability of C. D. If the liability of A. B. was unconditional, the conditional liability of C. D. might be treated as irrelevant surplusage.[2]

The name of the drawer is also necessary to the validity of a bill of exchange; for if it does not appear upon the face of the bill who the drawer is, the drawee will not be in a position to determine whether he should accept it.[3] No doubt can arise in respect to the invalidity of the bill which does not contain the name of the drawer, as long as there is no acceptance, for no one has then signed the paper, as the foundation of an obligation. But it becomes an interesting question what effect the acceptance of a bill, not signed by any drawer, will have. The matter has been much debated, but the conclusion finally reached is, that the acceptance does not give it any validity, unless the name of the drawer has been authoritatively written in it.[4] The authority to

[1] Ferris *v.* Bond, 4 Barn & Ald. 679. In this case, the court said: "This is not a promissory note against this defendant, within the statute of Anne. It operates differently as to the two parties. It is the absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, who undertakes to pay only in the event of Corner's not paying."

[2] See 1 Daniel's Negot. Inst. 101; Byles on Bills, 151 [*95].

[3] 1 Daniel's Negot. Inst. 101; Story on Bills, § 53.

[4] In Levis *v.* Young, 1 Met. (Ky.) 199, the action was against the ac-

insert the name of the drawer would generally be presumed from its delivery;[1] but even if the insertion of his name should be made without authority, the acceptor would nevertheless be bound to an innocent holder for value.[2] The only purpose for requiring the name of the maker or drawer to appear on the face of the note or bill is to ascertain his identity and to evidence his intention to

ceptor and indorser of a bill, to which there was no signature by the drawer. In delivering the opinion of the court, Duval, J., said: "The fallacy of all the reasoning of counsel upon this point, consists in their failure to recognize the distinction between a bill of exchange and the mere form of such an instrument. The words written upon the face of the paper in question are utterly inoperative, and without force or legal effect for any purpose as a commercial instrument, without the name of a drawer, either subscribed to the paper, or inserted in the body of it. Whether the name of the drawer, or of any subsequent party to the bill, be forged or fictitious, makes no difference as it respects the liability of the indorser. The indorsement implies an undertaking that the antecedent parties are competent to draw and accept the bill, and that their signatures are genuine. But the indorsement does not imply an undertaking that the paper indorsed contains the names of all the antecedent parties necessary to constitute a valid bill of exchange, when the face of the paper itself shows that it is blank as to all or any of such names. The indorsement of the paper would, doubtless, confer upon the party intrusted with it the authority to fill up the blanks with the names of any parties, at the discretion of the later; and so, the indorsement of a piece of blank paper would give the holder authority to make a bill of exchange, upon which the indorser would be liable, in the hands of an innocent holder for value, for whatever amount, or in the names of whatever parties the bill might be subsequently drawn and accepted. But certainly it cannot be supposed that in either of the cases stated, the indorser could be held liable, as such, until the paper should have been drawn and executed and completed as a bill of exchange. It is not the mere authority to make a bill, which of itself creates the liability, but it is the execution of that authority. See also McCall *v.* Taylor, 10 C. B. (N. S.) 30 (34 L. J. 365); Stoessiger *v.* S. E. R. Co., 3 El. & B. 549; May *v.* Miller, 27 Ala. 515.

[1] Harvey *v.* Cane, 34 L. T. R. 64; Scard *v.* Jackson, 34 L. T. R. 65, note *a*; In re Duffy, 5 L. R. Ireland, 927; Moes *v.* Knapp, 30 Ga. 942. See *post*, chapter on Rights of *Bona Fide* Holders.

[2] See *post*, chapter on Rights of *Bona Fide* Holders.

execute a bill or note. But this purpose may be attained by the use of any other means of identification than the name. Thus, it is the custom, in business connected with shipping, to incur liabilities in the name of the ship or of the owners of the ship, generally; and it has been held that a note signed "steamboat Ben Lee and owners," was properly executed.[1] It would doubtless be proper to make use of this general description of the maker or drawer in any kind of business, which is conducted under a trade name or mark, sufficiently definite to enable an easy identification of the person or persons intended. And, ordinarily, it does not need a certificate or attestation of witnesses to make the use of such a mark a valid signature. But some kind of evidence is necessary to establish the intentional adoption of the mark as a signature, and any peculiarity may be pointed out as a means of identification of the mark as the signature of a particular person.[2]

§ 12a. **The form and place of signature.** — But, ordinarily, names are used for the identification of persons; and it is customary, in signing commercial paper, for the maker or drawer, to write in full, at least his surname, although his initials have been held to be a sufficient signature.[3] The signature may be written in ink or in pencil, the only objection to the signature in pencil being its easy obliteration.[4] It may also be printed, but a printed signature must be proven to have been adopted by the maker or drawer as

[1] Sanders *v.* Anderson, 21 Mo. 402.

[2] George *v.* Surrey, 1 Moody & M. 516; Willoughby *v.* Moulton, 47 N. H. 205; Flint *v.* Flint, 6 Allen, 34; Brown *v.* Butchers' Bk., 6 Hill, 443; Shank *v.* Butsch, 28 Ind. 19; Lyons *v.* Holmes, 11 S. C. 429; Hilborn *v.* Alford, 22 Cal. 482; Flowers *v.* Billing, 45 Ala. 488.

[3] Merchants' Bank *v.* Spicer, 6 Wend. 443; Palmer *v.* Stephens, 1 Denio 471: 1 Parsons' N. & B. 36; 1 Daniel's Negot. Inst. 84.

[4] Geary *v.* Physic, 5 Barn. & C. 234; Brown *v.* Butchers' Bk., 6 Hill, 443; Closson *v.* Stearns, 4 Vt. 11; Reed *v.* Roark, 14 Tex. 329.

his signature.[1] A bill or note may be signed by an agent of the drawer or maker, as well as by himself; and ordinarily it does not require any written authority to enable him to do so.[2] The signature may be put in any part of the paper, at the top, as well as at the bottom, on the back as well as on the face.[3] Thus "I. J. S., promise to pay" and "I. J. S., request you to pay" have been held to be good executions of a note and bill, respectively, although there were no subscriptions by the maker or drawer.[4] But, of course, in all cases in which the signature appears in other than the customary place, some doubt is involved concerning the intention of the person to execute the paper, sufficient to put every reasonable person upon his inquiry. It casts suspicion upon the validity of the execution.

§ 13. **Joint and several notes.** — A note or bill may be executed by any number of persons. If it is executed by one person, it is called a several note; but if it is executed by two or more, it is either a joint or a joint and several note, according to the phraseology employed. If it is only a joint note, only one suit can be maintained upon it, to which all the joint-makers must be made parties. But if it is a joint and several note one suit may be brought against them all, or suits may be instituted against each one separately. But, according to the common law, the action could not be maintained against a number greater than one and less than all. The action must be against one or against all. Hence a joint and several note, in effect, con-

[1] Schneider *v.* Norris, 2 Maule & S. 286; Brown *v.* Butchers' Bank, 6 Hill, 443; Pennington *v.* Baehr, 48 Cal. 565 (1875).

[2] See *post*, chapter on Agency.

[3] Turnbull *v.* Thomas, 1 Hughes, 172; Hunt *v.* Adams, 5 Mass. 359; Clason *v.* Bailey, 14 Johns. 484; Steininger *v.* Hoch, 3 Wright, 263; Schmidt *v.* Schmaelter, 45 Mo. 502.

[4] Taylor *v.* Dobbins, 1 Strange, 399; Saunderson *v.* Jackson, 2 Bos. & P. 238.

sists of several notes, one more than the number of joint-makers.[1] And so separate and distinct are the joint and several liabilities, that the joint note may be valid, while one or more of the several notes may be void.[2] But this general statement must be taken with the understanding that a joint action against all the makers, and a satisfaction of the judgment in an action against any one of them, will be a bar to any further action.[3] If the note is signed by more than one person, and the plural pronoun "we" is

[1] Fletcher *v.* Dyte, 2 T. R. 78; Bulbeck *v.* Jones, 5 Jur. (N. S.) 1317; King *v.* Houre, 13 M. W. 565; Beechham *v.* Smith, E. B. & E. (96 E. C. L. R.) 442.

[2] Maclae *v.* Sutherland, 3 E. & B. (77 E. C. L. R.) 1; Byles on Bills, *8.

[3] Mr. Sharswood says, in his notes to Byles on Bills, *8: "What is thus broadly stated, certainly requires to be received with some modification. A joint and several note by A., B. or C., is not the separate note of each to all intents and purposes. The payee could not indorse A.'s note to one, B.'s note to another, and C.'s note to a third person; nor could he even make a separate transfer of the proportionate liability of each maker, without the consent of all three. Their consent might make a new special contract on the part of each to pay the assignee of each his proportion. In regard to the remedy, there is also an important distinction to be borne in mind. The holder may sue all the makers jointly, or each severally, but he cannot do both. As to remedy, then, there are not four notes, but either one or three, at the election of the holder. A suit against the three jointly would preclude an action against each — severally — and *e contra*. Buller, J., in Streatfield *v.* Halliday, 3 T. R. 782. The case of King and another *v.* Houre, 13 M. & W. 494, which is relied on as the authority for the doctrine of the text, decides merely that a judgment (without satisfaction) recovered against one of two joint debtors is a bar to an action against the other. *Secus* when the debt is joint and several. 'The distinction,' says Baron Parke, 'between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable; and so he is in one sense, that if sued separately, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable, in the same sense, as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and give different remedies to the obligee.' This is very true, but can hardly be said to support the position that such a bond is in legal effect four distinct bonds."

used in the body of the note, "we promise to pay," etc., it is a joint note.[1] And whenever a note is signed by two or more persons, it will be presumed to be a joint note, in the absence of anything on the face of it to indicate that it was to be a joint and several note.[2] In order to make a note joint and several, the promise to pay in the note is usually qualified by the adverbs "jointly and severally." But this is not necessary if the same intention is indicated in any other way. If a note is signed by more than one person, and the singular pronoun "I" is used in the body of the note, as the promissor, the note is joint and several;[3] and this, too, although one of the signatures is expressed to have been affixed by a surety.[4] A note, reading "we or either of us," is a joint and several note,[5] and so likewise is a note in the singular, and signed by one partner in the firm's name.[6] It does not affect the validity of a note, if it reads in the plural, and is signed by only one party, whether it appears that the note was intended to be a joint or a joint and several note. It will be a good and several note of the person who signs it and puts it into circulation.

[1] Barrett *v.* Funay, 38 Ind. 86.

[2] Johnson *v.* King, 20 Ala. 270; Chandler *v.* Ruddick, 1 Carter (Ind.), 391.

[3] March *v.* Ward, Peake's Rep. 130; Clerk *v.* Blackstock, Holt's N. P. C. (3 E. C. L. R.) 474; Hemmenway *v.* Stone, 7 Mass. 58; Ladd *v.* Baker, 6 Fost. (N. H.) 76; Monson *v.* Drake, 40 Conn. 552; Ely *v.* Clute, 19 Hun (N. Y.), 35; Partridge *v.* Colby, 19 Barb. 248; Holman *v.* Gilliam, 6 Rand, 39; Barrett *v.* Skinner, 2 Bailey, 88; Maiden *v.* Webster, 30 Ind. 317; Dill *v.* White, 52 Wis. 169.

[4] Dart *v.* Sherwood, 7 Wis. 523; Palmer *v.* Grant, 4 Conn. 389; Hunt *v.* Adams, 5 Mass. 358. But if a note reads "we promise" and is signed by two, one of whom characterizes himself as surety, the note is nevertheless joint. See cases *supra*.

[5] First Nat. Bk. *v.* Fowler, 36 Ohio St. 524; Pogue *v.* Clark, 25 Ill. 336; Harvey *v.* Irvine, 11 Iowa, 82.

[6] Doty *v.* Smith, 11 Johns. 543; Rees *v.* Abbott, Cowper, 832.

[7] Whitmore *v.* Nickerson, 125 Mass. 496; Rice *v.* Gove, 22 Pick. 158; Dickerson *v.* Burke, 25 Ga. 225; Holmes *v.* Sinclair, 19 Ill. 71.

The distinction between joint notes and joint and several notes has been practically abolished in most of the States, particularly in those States in which the New York code of procedure has been adopted, by a provision that in all joint contracts, suit may be brought against any number of the obligors, thus making all such contracts joint and several, whatever may be their phraseology.

§ 14. **Two or more drawers.** — The bill, like a note, may also be drawn by two or more persons, acting in their individual capacity as well as members of a copartnership.[1] But where they are acting as partners, the partnership is treated as one person, who draws the bill. Where two or more persons, not partners, unite in drawing a bill, they must be treated as independent legal personalities; and each is, therefore, entitled to demand and notice of the dishonor of the bill by the drawee.[2] Each is liable *in solido* to the drawee, if he accepts and pays the bill; and it has been held that the signature of one, in the character of surety, will not effect his liability to the drawee, even though the drawee knew it, and the word "surety" was written on the bill after the signature.[3] It does not much matter, where the drawers sign the bill; and if one of them, as surety, should sign on the back, instead of on the face, he cannot be held as an indorser, but must be sued in the character of drawer.[4]

[1] As to the powers of partners in respect to the law of commercial paper, see *post*, chapter on Partners.

[2] Suydam *v.* Westfall, 4 Hill, 211; *s. c.* 2 Denio, 205; McMean *v.* Little, 3 Baxter, 332.

[3] Suydam *v.* Westfall, 4 Hill, 211; 2 Denio, 205; Swilley *v.* Lyon, 18 Ala. 558. But see Griffith *v.* Reed, 21 Wend. 502; Wing *v.* Terry, 5 Hill, 160, in which it is held that a "surety" drawer is only liable to the payee or indorsee.

[4] Mathews *v.* Bloxsome, Q. B. 33 L. J. R. 209. See Penny *v.* Innes, 1 Cr. M. & R. 439. See *post*, chapter On Indorsement.

§ 15. **The name of the drawee.** — An orderly written bill of exchange contains the given name and surname of the drawee; and usually it is put in the left-hand corner at the bottom and on the face of the bill.[1] But the place of the address is not essential, provided it is possible to ascertain which is intended as the drawee. Nor is it necessary that the name of the drawee should appear on the bill, if a description of his person, official character, or place of residence is given, whereby it may be easily ascertained who is intended. Although irregular, this would be a good bill, certainly when accepted by the drawee.[2] But as long as a bill is not accepted by some one, the failure to put the name and address, or some other accurate description of the drawee on the face of the paper, is fatal to its validity as a bill. It was held differently in an early case,[3] but the position of the text is now generally sustained, both in this country and in England.[4] But it seems to be the generally

[1] 1 Daniel's Negot. Inst. 109; Story on Bills (Bennett's ed.), § 58, note 1. But it seems that the Italians and Hollanders are accustomed to place the name of the drawee on the back of the bill.

[2] Gray *v.* Milner, 8 Taunt. 739; 3 Moore, 90. In this case the bill read, "Payable at No. 1, Wilmot street, opposite the Lamb, Bethnal Green, London." See also Cork *v.* Bacon, 45 Wis. 192.

[3] Regina *v.* Hawkes, 2 Moo. C. C. 60.

[4] In Peto *v.* Reynolds, 9 Exch. 410, Alderson, B., said: "With respect to the question whether this instrument is or is not a bill of exchange, the case of Regina *v.* Hawkes is undoubtedly in point. I must own, however, that I now think I was wrong on that occasion. The case seems to have been decided on the ground that Milner *v.* Gray, 8 Taunt. 739, governed it; and the fact was not adverted to, that Gray *v.* Milner may thus be explained: that a bill of exchange made payable at a particular place or house, is meant to be addressed to the person who resides at that place or house. Therefore, in that case, the bill was on the face of it directed to some one; and the court held, that, inasmuch as the defendant promised to pay it, that was conclusive evidence that he was the party to whom it was addressed. But in the case of Regina *v.* Hawkes, the instrument was addressed to no one." In Ball *v.* Allen, 15 Mass. 435, Parker, C. J., said: "The mere possession of a paper drawn in the form of an order, there being no drawee in existence, we think, cannot

received opinion that such a defective bill will be cured by an acceptance by some one, since the actual acceptor would, by his acceptance, be estopped from denying that he was the drawee.[1]

Any uncertainty concerning the person who was intended to be the drawee may be explained away by parol evidence, at least when the ambiguity is latent.[2]

There may be two or more drawees, and each must accept individually in order to be bound, if they are not partners. But it is not essential to the negotiability of the bill that all should accept. The acceptance of one, or of any number less than the whole number, is sufficient, and the bill may be negotiated without the acceptance of the others.[3] But it has been held that the names of all must appear upon the face of the bill, in order that there might be a joint acceptance.[4]

§ 16. **Address to drawees in the alternative.** — Unlike the signatures of the makers or drawers, the bill of ex-

entitle the possessor to an action in any form; for the paper may have been carelessly dealt with as being imperfect, and may have come to the possessor by finding. It is enough for the purpose of justice, that the holder of such a paper may entitle himself to recover, merely by showing that he paid for it, or that he came otherwise fairly by it; for it can rarely happen that he will be unable to produce the person from whom he received it. If the circumstances are such as induce him to decline producing evidence of the manner in which the paper came to him, no probable harm will be the result of his loss of the money." See, also, Reynolds *v.* Peto, 11 Exch. 418; Watrous *v.* Hallbrook, 39 Tex. 572; 1 Parson's N. & B. 61; 1 Daniel's Negot. Inst. 106; Forward *v.* Thompson, 12 Up. Can. Q. B. R. 103; Ellis *v.* Wheeler, 3 Pick. 19.

[1] 1 Parsons' N. & B. 288, 289; Wheeler *v.* Webster, 1 E. D. Smith 3; Gray *v.* Milner, 8 Taunt. 739; 3 Moore, 90. But see, *contra*, Peto *v.* Reynolds, 9 Exch. 410; Davis *v.* Clarke, 6 Q. B. 16.

[2] Jackson *v.* Sell, 11 Johns. 201; McCullough *v.* Wainwright, 14 Pa. St. 171; Cork *v.* Bacon, 45 Wis. 192.

[3] Mountstephen *v.* Brooke, 1 Barn. & Ald. 224.

[4] Davis *v.* Clarke, 6 Ad. & El. (N. S.) (6 Q. B.) 16; Jackson *v.* Hudson, 2 Camp. 447.

change may be addressed to two or more persons in the alternative "to A. or to B.;" and foreign bills of exchange frequently read: "To A. and in case of need, apply to B." Or in French, it would read: "à A., au besoin chez B." In all such cases the holder is obliged to present the bill to all the persons named as alternative drawers, until he secures an acceptance.[1]

§ 17. **Designation of the payee.** — In order that a bill or note may be negotiable, it must indicate with certainty to whom it is payable. If no payee is named or described by the paper, it is not negotiable, and it is doubtful whether the paper has any value at all.[2] But it has been held that where the promise is to pay "you," without any further designation of the payee, it would be a good, non-negotiable note, and it may be shown by parol evidence to whom the note was payable.[3] But it is not necessary that the payee should be actually named in the paper. He may be described by the office he holds, and the official capacity in which he is made the payee. A bill or note may be made payable to the administrators or the executors of a deceased person, to an infant's guardian or to the trustees of one.[4] Or it may be made payable to the officer of a corporation or incorporated society; and without any further description, it will be payable to whoever occupies the office, at the time of presentment and demand, since the

[1] Anon., 12 Mod. 447; 1 Parsons' N. & B. 64, 65; 1 Daniel's Negot. Inst., §§ 98, 111.

[2] Gibson *v.* Minet, 1 H. Bl. 569; Brown *v.* Gilman, 13 Mass. 158; Enthoven *v.* Hoyle, 13 C. B. 373; Douglas *v.* Wilkeson, 6 Wend. 637; Mathews *v.* Redwine, 23 Miss. 233; Rich *v.* Starbuck, 51 Ind. 87; Mayo *v.* Chenowith, Breese, 155; McIntosh *v.* Lytle, 26 Minn. 336.

[3] Kinney *v.* Flinn, 2 R. I. 319; Shackleford *v.* Hooker, 54 Miss. 716.

[4] Adams *v.* King, 16 Ill. 169; Moody *v.* Threlkeld, 13 Ga. 55; Megginson *v.* Harper, 2 Cromp. & M. 322.

corporation or society was the real payee.[1] But if the bill or note is payable to the officer of an unincorporated society, it must be made payable "to the present" occupant of the office, as payment "to the secretary for the time being," would make the paper void for the want of certainty as to the payee.[2]

It has been held permissible in commercial paper to make it payable to a deceased person's estate, inasmuch as this would be equivalent to making it payable to his personal representatives,[3] and it is difficult to discover any substantial reason for denying the negotiability of such paper. The description of the payee is sufficiently clear, for under the statutes of administration, all *choses in action*, belonging to the estate of a deceased person, are payable to the personal representatives. But the weight of authority is against this view.[4] Commercial paper may also be made payable to "the heirs of A." or to "A. or his heirs," even though A. should then be alive;[5] or

[1] Holmes *v.* Jacques, 1 Q. B. 376; Fisher *v.* Ellis, 3 Pick. 322; Rogers *v.* Gibson, 15 Ind. 218; McBrown *v.* Corporation of Lebanon, 31 Ind. 268; Vater *v.* Lewis, 36 Ind. 293; Patton *v.* Melville, 21 Up. Can. Q. B. 263.

[2] Storm *v.* Sterling, 3 Ellis & B. 382; Robertson *v.* Steward, 1 Man. & G. 511; Rex *v.* Box, 6 Taunt. 325; Davis *v.* Garr, 2 Seld. 124.

[3] Hendricks' Exrs. *v.* Thornton, 45 Ala. 300.

[4] Tittle *v.* Thomas, 30 Miss. 132; Bowles *v.* Lambert, 54 Ill. 239 (but this case may be sustained on other grounds). In Lyon *v.* Marshal, 11 Barb. 248, Edwards J. said: "The instrument sued upon (by Lyon's representatives) was made payable to the estate of Moses Lyon, deceased, and not to any person or persons by name. Such an instrument is clearly not a promissory note under the statute. But, whatever it may be considered, it certainly is not a promise to pay the testator, for he is described as deceased. It could only be recovered upon as a promise to pay some other person or persons. If it be regarded as a promise to pay the plaintiffs, as it was treated in this case, there was no necessity for their suing in a representative capacity; and having done so unnecessarily, they are liable to pay costs, without a special motion or order for that purpose."

[5] Bacon *v.* Fitch, 1 Root. 181; Knight *v.* Jones, 21 Mich. 161.

to the bearer, to the holder, and the like.[1] Wherever there is a misdescription or misnaming of the payee, which causes an ambiguity, it will not be fatal to the negotiability of the paper, if it can be shown with the aid of extrinsic evidence who was intended.[2] A note payable to "The People of Illinois" will be construed as payable to the State of Illinois.[3] If a bill or note is payable to A., and there are two persons of the same name, father and son, the presumption of law is that the father was intended, unless the word "junior," or some other word of distinction, is added; but this is only a *prima facie* presumption, that may be rebutted by evidence that the son was intended. This presumption will also give way to a counter presumption, when the son has possession of the paper and brings an action upon it. He is entitled to recover, unless the defendant shows that the father was intended.[4] Where there is an acknowledgment or receipt of consideration from a person named, followed by an indefinite promise to pay, as, for example, where the paper reads: "Received of J. S. one hundred dollars, which I promise to pay on demand," it will be inferred from the acknowledgment of consideration that J. S. was the intended payee, and it will be regarded as a sufficient designation of the payee.[5] And where a note reads: "Due to bearer $100, which I promise to pay J. S. or order," it is payable to J. S. or order, and not to bearer.[6]

[1] Mechanics' Bank *v.* Straitor, 3 Abbott (N. Y. App.), 239; Hathwick *v.* Owen, 44 Miss. 803.

[2] Willis *v.* Barrett, 2 Starkie, 29; Jacobs *v.* Benson, 29 Me. 132; Hall *v.* Tafts, 18 Pick. 455; Jackson *v.* Sell, 11 Johns. 201; Cork *v.* Bacon, 45 Wis. 192.

[3] Esley *v.* People of Illinois, 23 Kan. 510.

[4] Stebbing *v.* Spicer, 19 L. J. C. P. 24; 3 C. B. (65 E. C. L. R.) 827; Sweeting *v.* Fowler, 1 Starkie, 106; Wilson *v.* Stubbs, Hobart, 330.

[5] Green *v.* Davies, 4 B. & C. 235; Ashley *v.* Ashley, 3 Moore & P. 186; Chadwick *v.* Allen, 2 Strange, 706; Pothier de Change, n. 31; Story on Bills, § 55.

[6] Cock *v.* Fellows, 1 Johns. 143.

§ 18. **Joint and alternative payees.**— A note or bill may be payable to two or more joint payees, and their interests are presumed, in the absence of proof to the contrary, to be co-equal.[1] Although a different conclusion has been reached by some of the courts,[2] it is the prevailing opinion in England and in the United States, that a bill or note will not be negotiable on the ground of uncertainty as to the payee, if it is made payable to two or more persons in the alternative.[3] But such a note or bill may be sued on as a non-negotiable instrument, at least in the names of all the payees.[4] To such an extent is the payment of commercial paper to alternative payees objected to, that this circumstance was held to deprive a note of its negotiability, where it was made payable "to Olive Fletcher or R. H. Oakes, administrators of Winslow Fletcher, deceased."[5] But the alternative payees in this case would not seem to be any serious uncertainty, since whoever received payment would receive it in a representative capacity and for the benefit of the decedent's estate.

[1] Tisdale *v.* Maxwell, 58 Ala. 40.

[2] Ellis *v.* McLemore, 1 Bailey L. 13; Spaulding *v.* Evans, 2 McLean, 139.

[3] Blanckenhagen *v.* Blundell, 2 Barn. & Ald. 418; Osgood *v.* Pearson 4 Gray, 455; Carpenter *v.* Farnsworth, 106 Mass. 561; Walrad *v.* Petrie, 4 Wend. 576; Willoughby *v.* Willoughby, 5 N. H. 245; Quinby *v.* Merritt, 11 Humph. 440. In Blanckenhagen *v.* Blundell, Abbott, C. J., said: "For if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute."

[4] Willoughby *v.* Willoughby, 5 N. H. 245; Walrad *v.* Petrie, 4 Wend. 576; Quinby *v.* Merritt, 11 Humph. 440.

[5] Musselman *v.* Oakes, 19 Ill. 81. In this case, Caton, C. J., said: "The instrument sued on was payable in the alternative to one of two persons, and for that reason is not a promissory note, and could not be sued on as such. * * * Here the promise was to pay Fletcher or Oakes; but which, is uncertain; which of them had the right to receive the pay is not specified, and the legal right to the money is not vested in either."

§ 19. **Fictitious or non-existing parties — Adopted names.** — In order to increase the number of indorsements, and thus to give the paper a fictitious credit, the names of fictitious persons are used; for example, the paper is made payable to a fictitious person, whose name appears also in an indorsement on the back. As fraud always vitiates a contract, the use of fictitious names on commercial paper, will make it invalid for all purposes, except in the hands of an innocent purchaser.[1] But a *bona fide* holder for value may sue the maker or drawer on it, as if it were payable to bearer.[2] In England it is held that the acceptor of a bill of exchange, payable to a fictitious person, may be sued on it, as if it were payable to bearer, if he knew of the fraud or fiction, when he accepted it, but that he is not liable if he were ignorant of the fraud.[3] It is difficult to see why the

[1] Hunter *v.* Jeffery, Peake's Ad. Cas.; Chitty, Jr., 587; Minet *v.* Gibson, 3 T. R. 481; 1 H. Bl. 569. But it seems that a person, who takes for value a note payable to a fictitious person, may recover the value in an action for money had and received. See Foster *v.* Shattuck, 2 N. H. 447.

[2] Collis *v.* Emett, 1 H. Bl. 313; Vere *v.* Lewis, 3 T. R. 298; Phillips *v.* Inthern, 18 J. S. (N. S.) (114 E. C. L. R.) 694: *s. c.* 18 C. B. (N. S.)694; Blodgett *v.* Jackson, 40 N. H. 26; Plets *v.* Johnson, 3 Hill (N. Y.), 115; Forbes *v.* Espy, 21 Ohio St. 483; Lane *v.* Krekle, 22 Iowa, 404; Stevens *v.* Strong, 2 Sandf. 139; Farnsworth *v.* Drake, 11 Ind. 103; Irving Nat. Bk. *v.* Alley, 79 N. Y. 536. In New York the same rule is laid down by statute. 1 N. Y. Rev. Stat. 768; Rogers *v.* Ware, 2 Neb. 29.

[3] Hunter *v.* Blodgett, 2 Yeates, 480; Tatlock *v.* Harris, 3 T. R. 174; Vere *v.* Lewis, 3 T. R. 182; Minet *v.* Gibson, 1 H. Bl. 569; Gibson *v.* Hunter, 2 H. Bl. 187, 288; Bennett *v.* Farnell, 1 Camp. 130. To the last case the reporter appended the following note: "Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co., and Gibson & Co., who negotiated bills, with fictitious names upon them, to the amount of nearly a million sterling a year. The first case was Tatlock *v.* Harris, 3 T. R. 174, in which the Court of King's Bench held that the *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it, in an action against the acceptor, for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should

ignorance or knowledge of the acceptor, that the named payee was a fictitious person, should affect his liability to an innocent holder, for his acceptance might well be taken as an indorsement of the legality of the whole proceeding.[1] Where the bill or note is made payable to a third person by his real name, neither the intended payee nor any subsequent holder can recover on it unless it is indorsed by the apparent payee, even though it be shown that he has no interest in the paper. This case is different from the one in which the name of the designated payee is altogether fictitious.[2] But there is no legal obstacle in the way of any one assuming a name different from the one that was given him by his father; and if he does this for honest purposes and in good faith, the use of such an adopted name will not vitiate the contracts to which he may become a party.[3] It

become the holder of the bill. In Vere *v.* Lewis, 3 T. R. 182, decided the same day, the court held there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bearer. Minet *v.* Gibson, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the Court of Common Pleas laid down the same doctrine, in Collis *v.* Emett, 1 H. Bl. 313. This decision was acquiesced in, but Minet *v.* Gibson was carried up to the House of Lords. 1 H. Bl. 569. The opinion of the judges being then taken, Eyre, C. B. (p. 618), and Heath, J. (p. 619), were for reversing the judgment of the court below, and Lord Thurlow, C., coincided with them (p. 625); but the other judges thinking otherwise judgment was affirmed (Parl. Cas. 8vo. II. 48). The last case upon the subject reported is Gibson *v.* Hunter, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held that, in an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons."

[1] See Rogers *v.* Ware, 2 Neb. 29.

[2] Rogers *v.* Ware, 2 Neb. 29.

[3] Ladd *v.* Rogers, 11 Allen, 209; Bartlett *v.* Tucker, 104 Mass. 345.

is not necessary for a man to have the consent of the legislature in order to change his name.

§ 20. **Same person as different parties.** — In order that commercial paper may be negotiated without indorsement and the consequent liability of indorsers, and yet avoid the commercial discredit of an indorsement "without recourse," it has become quite common for bills and notes to be made payable to the order of the drawer or maker, so that the named payee is the same person as the drawer or maker. The drawer or maker then indorses it in blank, and it is then transferred as if it had been made payable to bearer. Of course two parties, distinct and separate, are as necessary to the negotiation of a bill or note as they are to the making of any other contract. In consequence of this necessity, it was once supposed that a note or bill would be invalid, if the payee and the maker or drawer were the same person.[1] But while it is manifest that such a bill or note is valueless, until it has been transferred by indorsement to another person, because there has been no delivery, and consequently not a complete contract; as soon as it has been indorsed and delivered to the purchaser, there are two distinct separate parties to the contract, and the paper may be sued on as if originally made payable to bearer.[2] In a bill of exchange, the

[1] Flight *v.* McLean, 16 M. & W. 51; Muhling *v.* Sattler, 3 Metc. (Ky.) 286.

[2] See Brown *v.* De Winton, 17 L. J. C P. (60 E. C. L. R.) 380; Gay *v.* Landor, 17 L. J. C. P. (60 E. C. L. R.) 287; Wood *v.* Mytton, 10 Q. B. 805; Lovejoy *v.* Spafford, 93 U. S. 430; Bishop *v.* Rowe, 71 Me. 263; Smalley *v.* White, 44 Me. 442; Commonwealth *v.* Butterick, 100 Mass. 12; Commonwealth *v.* Dullinger, 118 Mass. 439; United States *v.* White, 2 Hill, 154; Plets *v.* Johnson, 3 Hill, 114; Miller *v.* Weeks, 22 Pa. St. 9; Hall *v.* Shorter, 46 Ala. 453; Woods *v.* Ridley, 11 Humph. 194; Rice *v.* Hogan, 8 Dana, 134; Wilder *v.* De Wolf, 24 Ill. 190; Muldrom *v.* Caldwell, 7 Mo. 563; Scull *v.* Edwards, 6 Eng. (Ark.) 24; Main

drawer may draw upon himself, so that the drawer and drawee

v. Hilton, 54 Cal. 110. In Hooper *v.* Williams, 2 Exch. 13, Parke, B., said: "The principal question was, what the effect of this instrument was as it stood originally before it was indorsed, and whether it was, within the statute of 3 and 4 Anne, chapter 9, a good and valid note payable to the order of the maker. The opinions of this court and of the Queen's Bench as to this point are at variance with one another. In Flight *v.* McLean, this court held, on special demurrer to the first count of a declaration — stating a note payable to the order of the maker, and indorsed to the plaintiffs — that the count was bad, such a note not being written within the statute of Anne. The case of Wood *v.* Mytton, afterward came on in the Queen's Bench. It was an action on a similar note, indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment, and the court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterwards explained, the construction of the statute by the two courts differs. After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The court of Queen's Bench thought that, though the first part of the first section of the statute of Anne, applied only to notes payable to another person, or his order, or to bearer, which notes it makes obligatory between the parties, yet that the second part applies to every note payable to any person, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee when the note was payable to another person, or to another person or order, and to the bearer, whoever at any time he might be, a right to sue, thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer; and then the section proceeds to make the class of notes payable to a person or order transferable. We think that the Legislature, by the second part of the section, could only mean to make that instrument which gave a right to sue assignable, and no right to sue could exist in any one in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement. Until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and indorsee; and then,

will be the same person.[1] And when indorsed, it will be a good negotiable instrument, in which the drawer, the drawee and the payee were the one person, the drawer drawing on himself, payable to his own order.[2] But in all such cases, where the drawer and drawee are the same person, the paper may be treated, at the option of the indorsee, either as a bill of exchange or a promissory note. The drawer is bound without notice of dishonor.[3] And in order that it may be treated as an accepted bill, there is no need of a

and not until then, it became an assignable note. * * * It appears to us then, that the instrument in this case was when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration. This view of the case reconciles the decision of this court in Flight *v.* McLean, with that of the Queen's Bench in Wood *v.* Mytton, but not the reasons given for those decisions. In the case in this court, the declaration was not bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was in substance good, for it set out an inartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff. The difference between the courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd form, are still not invalid; and it might be of much inconvenience if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne — and for what good reason no one can tell — has become of late years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them." The same rule is declared to be the law in New York by statute. 1 Rev. Stat. N. Y. 768.

[1] Debers *v.* Harriott, 1 Shower, 163; Robinson *v.* Bland, 2 Burr. 1077; Harvey *v.* Kay, 9 B. & C. 364; Roach *v.* Ostler, 1 Man. & Ry. 120; Planters' Bk. *v.* Evans, 36 Tex. 592; French *v.* Gordon, 10 Kan. 370.

[2] Harvey *v.* Kay, 9 Barn. & Cres. 364; Lovejoy *v.* Spafford, 93 U. S. 430; Randolph *v.* Parish, 9 Porter, 76; Walton *v.* Williams, 44 Ala. 347; Planters' Bk. *v.* Evans, 36 Tex. 592.

[3] Roach *v.* Ostler, 1 Man. & Ry. 120; Armfield *v.* Allport, 27 L. J. Exch. 42; Wardens of St. James Church *v.* Moore, 1 Ind. 289; Chicago R. R. Co. *v.* West, 37 Ind. 211; Randolph *v.* Parish, 9 Porter, 78; Planters' Bk. *v.* Evans, 36 Tex. 592.

written acceptance,[1] since in such a bill the drawer guarantees that he will, as drawee, honor the bill.

The most common instances of bills of exchange, where the drawer and the drawee are the same person, are those in which one member of a firm or corporation draws on a branch of the firm or corporation doing business in a different place;[2] those in which an agent draws a bill upon his principal, with his authority;[3] and those in which one officer of a corporation draws on another officer, who has the custody of the funds.[4] In all these cases the paper may be treated as a bill or note, at the option of the holder.

The identity of the parties to a bill or note will not be presumed by the court from the fact that they have the same names. In order, therefore, that a bill whose drawer and drawee are the same person, may be treated as a promissory note, the identity of the parties must be alleged and proved.[5] But it is probably more customary to sue upon such paper as bills of exchange, and not admit the identity of the drawer and the drawee.[6]

§ 21. **Words of negotiability.**— When bills of exchange first came into use, as has already been explained, *choses in action* were in general non-assignable; and in order that the intention of the parties, to make commercial paper assignable and negotiable, may be indicated, it became the custom to make it in express terms payable to A. or order, or

[1] Cunningham *v.* Wardwell, 3 Fairfax, 466; Planters' Bk. *v.* Evans, 36 Tex. 592.

[2] Miller *v.* Thompson, 3 Man. & G. 576; Williams *v.* Ayres, 3 App. Cas. 133.

[3] Raymond *v.* Mann, 45 Tex. 301.

[4] See *post*, § 128.

[5] Roach *v.* Ostler, 1 Man. & Ry. 120; Harvey *v.* Kay, 9 Barn. & C. 364; Starke *v.* Cheeseman, Carthew, 509; Cooper *v.* Poston, 1 Duval, 92.

[6] Walton *v.* Williams, 44 Ala. 347.

bearer, or using like words conveying an authority to transfer it. So, also, when promissory notes were by the statute of Anne declared to be negotiable, like bills of exchange, the notes which would fall within the statute were described as containing these or other words of negotiability. It has in consequence become the universal opinion that in order that commercial paper may be negotiable and the indorsers be held liable as guarantors by the holder of the paper, it must contain these or like words of negotiability.[1] Without these words of negotiability, the assignee of the bill and note would acquire only a right of action against his immediate indorser, and according to the early common law he could not maintain an action on it against the maker or the drawer and acceptor.[2] But since the inauguration and establishment of the law of commercial paper, the common-law prohibition of the assignment of *choses in action* has by statute been almost entirely abolished, so that a bill or note need not be negotiable in order to be assignable. And it is not without foundation in the reason of things to assert, that since the words of negotiability were needed to distinguish bills and notes that could be assigned from those which fell under the common-law prohibition against assignment; and since, furthermore, the peculiar principles of negotiability were subsequently developed in obedience to the demands of the commercial world; now that all *choses in action* may be assigned, these words of negotiability

[1] Smith *v.* Kendall, 6 T. R. 143; *s. c.* 1 Esp. 231; Burchell *v.* Slocock, 2 Ld. Raym. 1545; Rex *v.* Box, 6 Taunt. 328; Bank of Sherman *v.* Apperson, 4 Fed. R. 25; Maule *v.* Crawford, 14 Hun (N. Y.), 193; Douglass *v.* Wilkeson, 6 Wend. 637; United States *v.* White, 2 Hill (N. Y.), 59; Hackney *v.* Jones, 3 Humph. 612; Warren *v.* Scott, 32 Iowa, 22; Hisford *v.* Stone, 7 Neb. 380.

[2] Hill *v.* Lewis, 1 Salk. 132; Smallwood *v.* Vern, 1 Strange, 478; Ballingalls *v.* Gloster, 3 East, 482; Douglass *v.* Wilkeson, 6 Wend. 637; United States *v.* White, 2 Hill (N. Y.), 59; Hackney *v* Jones, 3 Humph. 612; Warren *v.* Scott, 32 Iowa, 22.

cease to be an essential to a negotiable bill or note. It may be a doubtful question, whether this position could be taken in respect to promissory notes, since some of the authorities claim that promissory notes are not negotiable independently of statute,[1] and all the statutes describe the notes as containing these words. But the question is not thus complicated in its application to bills of exchange; nor is it so, in relation to promissory notes, in those States in which such notes are held to be negotiable at common law. If it, therefore, be satisfactorily proven that the only object of using these words in commercial paper was to distinguish such paper from other *choses in action*, which could not be assigned, there is no obstacle in the way of their being declared to be non-essential to a negotiable instrument. But there does not seem to be any disposition on the part of the courts to take this departure; and in the same way as they continue to hold that seals are necessary to the validity of a deed of conveyance of lands, mistaking the causes and objects which co-operated in the development of the law,[2] so we may expect the courts to go on holding that these useless words of negotiability are necessary to make a note or bill negotiable, until the change is made by statute. But these words are only necessary to give to the bill or note its negotiable qualities, viz.: that the holder may take it free from equitable defenses and with the liability of the indorser or his indorsement as a guarantor. All the other qualities of commercial paper, for example, the allowance of days of grace, may be claimed for paper that has not these words of negotiability.[3]

No exact or particular form of words is necessary in order

[1] See *ante*, § 6.

[2] See Tiedeman on Real Prop., § 783.

[3] Story on Bills, § 60; Michigan Bk. *v.* Eldred, 9 Wall. 544; Wells *v.* Brigham, 6 Cush. 6; Averett's Admr. *v.* Booker, 5 Gratt. 167.

to give the character of negotiability to commercial paper. It was once supposed that a bill or note, payable to one or bearer, was not negotiable.[1] It is, however, not only well established now, that such an instrument is negotiable;[2] but it is not even necessary that the instrument should be made payable to one or order or bearer. A paper payable to the order of a person is as negotiable as one payable to A. or order;[3] and any other word or words, signifying an authority to transfer, may be used in the place of "order" and "bearer." Thus instruments payable to a person or corporation or holder,[4] to A. or "assigns"[5] and the like have all been held to be negotiable. As it was expressed by the Supreme Court of Pennsylvania, "'order' or 'bearer' are convenient and expressive, but clearly not the only words which will communicate the quality of negotiability. Some equivalent words should be used. Words in a bill, from which it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person. The concession, therefore, may be made, that if the makers of this note, having omitted the usual words to express negotiability, had said 'this note is and shall be negotiable,' it would have been negotiable."[6]

[1] Hodges *v.* Steward, 1 Salk. 125.

[2] Grant *v.* Vaughan, 3 Burr. 1516; Eddy *v.* Bond, 19 Me. 461; Davega *v.* Moore, 3 McCord, 482. But a note, payable "to the bearer A.," is held not to be negotiable. Warren *v.* Scott, 32 Iowa, 22. In Illinois, it has been held, under the language of the State statute, that notes payable to a person or bearer are not negotiable. Garvin *v.* Wiswell, 83 Ill. 218.

[3] Frederick *v.* Cotton, 2 Shower, 8; Smith *v.* McClure, 5 East, 476; Howard *v.* Palmer, 64 Me. 86; Durgin *v.* Bartol, 64 Me. 473; Fisher *v.* Pomfret, 12 Mod. 125; Huling *v.* Hugg, 1 W. & S. 418.

[4] County of Wilson *v.* National Bank, 103 U. S. 776; Putnam *v.* Crymes, 1 McMull. 9.

[5] Porter *v.* City of Janesville, 3 Fed. Rep. 619; Douglass *v.* Wilkeson, 6 Wend. 637; United States *v.* White, 2 Hill (N. Y.), 59.

[6] Porter, J., in Raymond *v.* Middleton, 29 Pa. St. 530.

§ 22. **Note made negotiable at particular bank.**—Sometimes a note is made negotiable at a particular bank. "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner the sum expressed on its face. It would be a fraud in the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up."[1] Because a note is made negotiable at a certain bank, it does not mean that it is also payable at that bank unless this is expressly stated. And even when a note is "negotiable and payable" at a certain bank named, it may be negotiated and paid elsewhere.[2]

§ 23. **A distinct obligation to pay.** — The negotiable bill or note must also create by the words used, or by necessary implication, a distinct or certain obligation to pay the sum of money stated. A bill must contain a certain direction or command to the drawee to pay to the payee, while the note must contain a certain promise to pay. The politeness of commercial intercourse has made it more or less customary to make use of the phrase "please pay." It is only a form of civility, and does not indicate that the direction to pay is any less a command. It has, therefore, been generally held that the use of that expression will not deprive the paper of its negotiable character.[3] But where the entire phraseology of the instrument indicates that it presents a request, the granting of which is a favor and not a right, it is usually held that such a paper is not a bill of ex-

[1] Marshall, Ch. J., in Mandeville *v.* Union Bank, 9 Cranch, 9.

[2] Wardell *v.* Hughes, 3 Wend. 416; Schoharie Nat. Bank. *v.* Bevard, 51 Iowa, 258.

[3] Jarvis *v.* Wilson, 46 Conn. 90; Patterson *v.* Poindexter, 6 Watts & S. 235; Bresenthal *v.* Williams, 1 Duval, 329; Wheatley *v.* Strobe, 12 Cal. 92.

change.[1] The employment of words of negotiability will, however, counteract the effect of words of supplication, and will make an instrument a good bill, which would otherwise be defective for the want of a certain direction to pay.[2] So, also, where there is a certain promise to pay, expressions of gratitude will not affect the legal character of the note.[3]

The word "pay" need not necessarily be used. Any other equivalent such as "deliver" or "credit in cash" will be sufficient.[4]

It is necessary to the character of a promissory note that it should contain a certain promise to pay, but no precise form of words is required, provided they clearly present a promise to pay, and it is not merely an acknowledgment of indebtedness.[5] In England it is definitely settled that mere due bills, or "I. O. U.'s," as they are called there, are not promissory notes in any sense, they being nothing more than acknowledgments of existing indebtedness, without any express promise to pay.[6] This

[1] Thus instruments reading "Please to send £10 by bearer, as I am so ill I cannot wait upon you," (The King *v.* Ellor, 1 Leach Cr. L. 323), or "Mr. Little, please to let the bearer have £7, and place it to my account and you will much oblige your humble servant" (Little *v.* Slackford, 1 M. & M. 371), were held not to be bills of exchange. On the other hand, it has been held that a paper reading. "Please to let bearer have $50; I will arrange it with you this afternoon, yours most obedient," was a good bill. Bresenthal *v.* Williams, 1 Duval, 329.

[2] Thus a paper, whose language was: "Mr. Nelson will much oblige Mr. Webb by paying I. Ruff *or order*, on his account, twenty guineas," was declared to be a negotiable bill. Ruff *v.* Webb, 1 Esp. R. 129.

[3] Ellis *v.* Mason, 7 Dowling, 598.

[4] Morris *v.* Lee, 2 Ld. Raym. 1396; Ellison *v.* Collinridge, 9 C. & B. 570; Allen *v.* Rea Fire etc., Ins. Co., 9 C. & B. 574. But see Woolley *v.* Sergeant, 3 Halsted, 262.

[5] "I promise to pay or cause to be paid," was held to be sufficient. Lowell *v.* Hill, 6 Car. & P. 238.

[6] Fisher *v.* Leslie, 1 Esp. 425; Israel *v.* Israel, 1 Camp. 499; Payne *v.* Jenkins, 4 Car. & P. 325; Fesenmayer *v.* Adcock, 16 M. & W. 449; Horne

is also the law in some of the United States.[1] But in others of the States a mere naked due bill has been held to be a good promissory note,[2] and, like bills of exchange, when the words of acknowledgment are accompanied by words of negotiability, due bills are very commonly held to be good promissory notes.[3] So, also, the words "on demand" will be sufficient evidence of a promise to pay, to give to a due bill the character of a promissory note,[4] but not the words "for value received."[5] A guaranty of another's debt is not a promissory note, as where one undertakes to pay "a sum of money" for goods ordered by a third person.[6]

§ 24. **Time of payment.** — Bills and notes must also indicate, either expressly or by implication, the time of payment. They are usually made payable at a certain

v. Bedfearne, 4 Bing. (N. C.) 433; Melanatte *v.* Teasdale, 13 M. & W. 216; Tompkins *v.* Ashby, 6 B. & C. 541 (9 Dow. & Ry. 543).

[1] Currier *v.* Lockwood, 40 Conn. 348; Read *v.* Wheeler, 2 Yerg. 50; Gray *v.* Bowden, 23 Pick. 282; Davis *v.* Allen, 3 Comst. 168; Hotchkiss *v.* Mosher, 48 N. Y. 478.

[2] Cummings *v.* Freeman, 2 Humph. 145 (overruling Read *v.* Wheeler, 2 Yerg. 50); Brewer *v.* Brewer, 6 Ga. 588; Fleming *v.* Burge, 6 Ala. 373; Anderson *v.* Pearce, 36 Ark. 293; Brady *v.* Chandler, 31 Mo. 28; Jacquin *v.* Warren, 40 Ill. 459.

[3] Sackett *v.* Spencer, 29 Barb. 180; Russell *v.* Whipple, 2 Conn. 536; Carver *v.* Hayes, 47 Me. 257; Hussey *v.* Winslow, 59 Me. 170; Franklin *v.* March, 6 N. H. 364; Cummings *v.* Freeman, 2 Humph. 144; Huyck *v.* Meador, 24 Ark. 192; Marrigan *v.* Page, 4 Humph. 247.

[4] Smith *v.* Allen, 5 Day, 337. It is certainly a promissory note, where a due bill is stated to be "payable on demand," Casborne *v.* Dutton, 1 Selwyn's N. P. 401; Waithman *v.* Elzee, 1 C. & K. 35; Kimball *v.* Huntington, 10 Wend. 675; Pepoor *v.* Stagg, 1 Nott & McCord, 102; Mitchell *v.* Rome R. R. Co., 17 Ga. 574.

[5] Currier *v.* Lockwood, 40 Conn. 348; Gray *v.* Bowden, 23 Pick. 282; Davis *v.* Allen, 3 Comst. 168; Hotchkiss *v.* Mosher, 48 N. Y. 478; Read *v.* Wheeler, 2 Yerg. 50. But see, *contra*, Finney *v.* Shirley, 7 Mo. 42; McGowen *v.* West, 7 Mo. 42; Huyck *v.* Meador, 24 Ark. 192.

[6] Jarvis *v.* Wilkins, 7 M. & W. 410.

fixed time in the future,[1] or a specified time "after date," or "after sight;" or they may be made payable "at sight" or "on demand." Whenever no time is specified on the face of the instrument, it is presumed to be payable on demand.[2] And the same conclusion has been reached, where the paper was payable "——— months after date."[3] A little change in phraseology from what is ordinarily used will not affect the time of payment, provided it conveys the same meaning. Thus a note or bill payable "on call" or "when demanded" is payable on demand.[4] So, also, is a bill or note construed to be payable on demand, when the time of payment is left more or less at the option of the holder. Thus, for example, where a note was payable "in such installments and at such times as the directors of said company may from time to time require," it was held to be in effect payable on demand.[5] A bill or note may also be payable at a specified time after demand or notice, as in the note, which was made payable "in whole or from time to time in part, as the same shall be required within thirty days after demand, or upon notification of thirty days in any newspaper."[6] When the

[1] Martin *v.* Lewis, 30 Gratt. 672.

[2] Kendall *v.* Galvin, 15 Me. 151; Porter *v.* Porter, 51 Me. 376; Bacon *v.* Page, 1 Conn. 404; Whitlock *v.* Underwood, 2 B. & C. 157; Abbott *v.* Douglass, 1 C. B. 496; Aldons *v.* Cornwell, L. R. 3 Q. R. 573; Thompson *v.* Ketchum, 8 Johns. 189; Herrick *v.* Bennett, 8 Johns. 374; Cornell *v.* Moulton, 3 Denio, 12; Gaylord *v.* Van Loan, 15 Wend. 308; Stover *v.* Hamilton, 21 Gratt. 273; Bowman *v.* McChesney, 22 Gratt. 609; Freeman *v.* Ross, 15 Ga. 252; Collier *v.* Gray, 1 Tenn. 110; Jones *v.* Brown, 11 Ohio St. 601; Green *v.* Drebillis, 1 Iowa, 552; Keyes *v.* Fenstermaker, 24 Cal. 329.

[3] McLean *v.* Nichlen, 3 Vict Rep. 107.

[4] Kingsbury *v.* Butler, 4 Vt. 458; Bowman *v.* McChesney, 22 Gratt. 609.

[5] White *v.* Smith, 77 Ill. 351; Washington Co. Mut. Ins. Co. *v.* Miller, 26 Vt. 77; Goshen *v.* Turpin, 9 Johns. 217.

[6] Protection Ins. Co. *v.* Hill, 31 Conn. 534; Clayton *v.* Gosling, 5 B. & C. 360; Dutchess Co. *v.* Davis, 14 Johns. 238; Stillwell *v.* Craig, 58

word "month" is used in the statement of the time of payment, a calendar month is presumed to be intended; and so likewise will a calendar year be presumed, when the word "year" is employed. It is stated by Mr. Story, that in England foreign bills are frequently drawn payable at *usance* or *usances;* this means that the bill is payable at such time as the custom of mercantile intercourse between the country of the drawer and the place of payment ordinarily prescribes for the payment of such bills.[1]

§ 25. **Payment must be unconditional.** — It is also a requisite of commercial paper that it must be payable absolutely and at all events. If the payment is made to be dependent upon any contingent event, the instrument ceases to be commercial paper. In order to be negotiable, the payment must be unconditional. Numerous cases are given in which the paper was declared to be non-negotiable because the payment was subjected to a contingency.[2] And the negotiability of the paper will be destroyed as to the whole sum that is payable, even though the contingency relates only to a part.[3] So, also, is the note or bill non-negotiable, where it is payable after the happening of two events, one of which is contingent.[4]

Mo. 24; Walker *v.* Roberts, Car. & Marsh. 590; Gates *v.* Hibbard, 5 Biss. 99. In Hobarts *v.* Dodge, 1 Fairfax, 156, the note was payable "on demand with interest after four months," it was held to mean "payable four months after demand." But see Loring *v.* Gurney, 5 Pick. 15.

[1] Story on Bills, § 50.

[2] Provided a certain ship should arrive; (Coolidge *v.* Ruggles, 15 Mass. 387; Palmer *v.* Pratt, 2 Bing. 185; provided a railroad should be built to a certain point in a certain time; (Blackman *v.* Lehman, 63 Ala. 547; Eldred *v.* Malloy, 2 Col. 320); provided the maker shall be able (Ex parte Tootle, 4 Ves. 372; Lalinas *v.* Wright, 11 Tex. 572); and for cases in which like conditions were held to deprive the instrument of its negotiable character, see Appleby *v.* Beddolph, 8 Mod. 363; Mason *v.* Metcalf, 8 Baxt. 440; Roberts *v.* Peake, 1 Burr. 323.

[3] Palmer *v.* Gray, 6 Gray, 340.

[4] Sackett *v.* Palmer, 25 Barb. 175.

The payment may also be made conditional by the uncertainty or indefiniteness of the time of payment. The uncertainty as to the day when the note or bill is payable is not a defect, provided the time described in the paper must come sooner or later. Such an uncertainty may exist, without taking away the negotiable character of the paper. Nor is remoteness of the time material.[1] Thus, a note or bill, payable at a certain time after the death of a person, whether he be the maker, payee, or drawee, would be negotiable, for the person would be sure to die, and hence the payment is not conditional.[2] And it has also been held in England, that a note or bill is negotiable which is payable after a government ship has been paid off, since the government is sure to pay.[3]

But a note or bill will not be negotiable, where it is payable after an occurrence, which may never happen. Whenever an instrument is made payable after an uncertain event, it is deprived of its negotiable character. Thus, a note payable when, or at a specified time after, one comes of age, is not negotiable, because it is uncertain whether the person will live until he reaches his majority.[4] And

[1] Worth *v.* Case, 42 N. Y. 362.

[2] Cook *v.* Colehan, 2 Strange, 1217; Colehan *v.* Cooke, Welles, 393; Roffey *v.* Greenwell, 10 A. & E. 222; Bristol *v.* Warner, 19 Conn. 7; Conn *v.* Thornton, 46 Ala. 587; Mortee *v.* Edwards, 20 La. Ann. 236; Mr. Daniel cites (see 1 Negot. Inst. § 46, note 2) from Morrison's Dict. of Decisions, p. 1408, the Scotch case of Stewart *v.* Fullerton, "in which it appears that a party accepted a bill payable at a certain time after his decease. He survived the acceptance thirty-seven years. The court regarded the matter as so anomalous as not to be subject of a bill of exchange, and sustained objections to the bill."

[3] Andrews *v.* Franklin, 1 Strange, 24; Evans *v.* Underwood, 1 Wils. 262. But see, *contra*, 1 Parsons' N. & B. 30.

[4] Kelley *v.* Hemmingway, 13 Ill. 604. But when coming of age is referred to merely for the purpose of indicating the actual time of payment, and the payment is not made to depend upon the fact that this person reaches his majority, it will be a good note, since it would be payable

other instances may be cited, where the contingency of the event or fact of payment destroys the negotiability of the paper.[1] During the late civil war of the United States, it became quite common in the Southern States to make notes payable at a specified time after peace was declared between the United States and the Confederate States. The Confederate treasury notes were all made payable in specie "six months after peace," and no doubt suggested the propriety of using similar limitations of time in private notes. In consequence of the fact that the declaration of peace between the United States and the Southern Confederate States would involve necessarily the successful establishment of an independent government in the Southern States, it was held that these notes were invalid, because it was a wager upon the success of the Southern Confederacy; and further more the success of the Confederacy being uncertain, the promise to pay became conditional, and deprived the note of the negotiable character.[2] But in most of the cases, in which the character of such notes was considered, they were construed to be payable at a specified time after the cessation of hostilities between the two sections of the country, and not conditionally upon the success of the Confederacy. The promise to pay being uncondi-

absolutely at the time, when the person would come of age, if he were to continue in this life. Gross *v.* Nelson, 1 Burr. 226.

[1] "When J. S. shall marry." Pearson *v.* Garrett, 4 Mod. 242; Beardsley *v.* Baldwin 2 Strange, 1151. "When a particular sale or suit is concluded." Hill *v.* Halford, 2 B. & P. 413; De Forest *v.* Tracy, 6 Cow. 151; Shelton *v.* Bruce, 9 Yerg. 24. When a stated amount of money is collected or certain dividends declared. Corbett *v.* State of Georgia, 24 Ga. 287; Brooks *v.* Hargraves, 21 Mich. 255. Subject to a certain contract or policy. Cushing *v.* Field, 70 Me. 50; Am. Exch. Bk. *v.* Blanchard, 7 Allen, 332. But it will not make a note non-negotiable to have on its face the number of the policy for which it was given. Union Ins. Co. *v.* Greenleaf, 64 Me. 123. See, also, for similar cases, Grant *v.* Wood, 12 Gray 220; Husband *v.* Epling, 81 Ill. 172.

[2] Harris *v.* Lewis, 5 W. Va. 576; McNinch *v.* Ramsey, 66 N. C. 229.

tional, and on an event, which was sure to happen, though the exact time of its happening was unknown, the notes were declared to be negotiable.[1]

Although the time of payment must be certain and definitely ascertained; and although probably a bill or note would be defective, if it were made payable alternatively at two different dates at the same place; yet it has been held, and undoubtedly on reasonable grounds, that a bill is good, which is made payable in New York, on one day and in Paris on a subsequent day.[2]

§ 25*a*. **Payment on or before a certain date.** — A bill or note, particularly the latter, is often made payable on or before a certain date. Although it has been held in some of the States that such a note is not negotiable, because the time of payment is too indefinite;[3] yet the weight of

[1] Brewster *v.* William, 2 S. C. 455; Nelson *v.* Manning, 53 Ala. 549; Gaines *v.* Dorsett, 18 La Ann. 563; Mortee *v.* Edwards, 20 La. Ann. 236; Knight *v.* Reynolds, 37 Tex. 204; Atcheson *v.* Scott, 51 Tex. 213 (overruling Thompson *v.* Houston, 31 Tex. 610.

[2] Henschel *v.* Mahler, 3 Denio, 428.

[3] "Each of the instruments in suit expresses a promise to pay a certain sum of money in a year and a half from its date, 'or sooner at the option of the mortgager,' with interest at a certain rate 'during said term.' The principal sum is to be paid, either at the time specified, or at any earlier time that the mortgager may elect. The interest is to be computed only until the note is paid. Both the time of payment of the principal, and the amount of the interest, are uncertain, and depend upon the election of the mortgager, who would seem, from the memorandum upon the note itself, to be the maker of the note. But if he were a third person, it would not aid the plaintiff. In either alternative, the contract, not being a promise to pay a fixed sum of money at a definite time, lacks the essential quality of a negotiable promissory note and cannot be sued upon as such." Gray, Ch. J., in Stults *v.* Silva, 119 Mass. 139. See also Way *v.* Smith, 111 Mass. 523; Hubbard *v.* Mosely, 11 Gray, 170; Fralick *v.* Norton, 2 Mich. 130; Chouteau *v.* Allen, 70 Mo. 339. In the last case it was provided in corporate bonds that "the company reserve the right to pay the same at any time by adding to the principal a sum equal to twenty per cent. thereof."

authority is decidedly in favor of conceding the negotiable character to such notes. In a case, involving the construction of one of these notes, Cooley, J., said: "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiability is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason." [1] Notes are made payable on or before a certain date, at the option of the maker, for the purpose of enabling the maker to save the accrument of interest by paying as soon before the prescribed time of payment, as he can. And when the note contains this provision, a right is reserved to the maker, the exercise of which will reduce the gross sum of money which the

[1] Mattison *v.* Marks, 31 Mich. 421. See, to same effect, Smith *v.* Ellis, 29 Me. 422 (payable "as soon and as fast as the money could be collected; and, if not collected, in four years;") Stevens *v.* Blount, 7 Mass. 240 (payable "by 20th of May, or when he completes the building according to contract;") Goodloe *v.* Taylor, 3 Hawks, 458 ("against the 19th of December, or when the house John Mayfield has undertaken to build for me is completed";) Jordan *v.* Tate, 19 Ohio (N. S.) 586; Helmer *v.* Krolick, 36 Mich. 373; Gardner *v.* Barger, 4 Heisk. 669 (payable in nine months, "or as A.'s horse earns the money in the cavalry service;") Ernst *v.* Steckman, 74 Pa. St. 13 (payable twelve months after date or sooner if made out of a certain sale;") Walker *v.* Woollen, 54 Ind. 164; Woollen *v.* Ulrich, 64 Ind. 120; Noll *v.* Smith, 64 Ind. 511; Cidne *v.* Chidester, 85 Ill. 523; Palmer *v.* Hummer, 10 Kan. 464 (payable in six months or "as soon as I can with due diligence make the money out of said patent right.") In Cote *v.* Buck, 7 Metc. 588, the note was payable "as soon as realized" and contained the further clause "to be paid in the coming season." Shaw, Ch. J., held that the note was negotiable, and said: "Whatever time may be understood by the 'coming season,' whether harvest time or the coming year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment."

holder is to receive by the amount of interest he has thus saved. It would seem, therefore, that these notes would be more open to objection, because the amount of money was uncertain, than because the time of payment is too indefinite. But this objection is not sufficiently substantial to justify a repudiation of a very useful kind of promissory note.[1]

§ 25*b*. **Payment when convenient or possible.** — Not only are notes held to be negotiable, which are payable on or before a certain date, but the American courts, generally, have with very remarkable liberality declared notes to be negotiable, which were made payable "as soon as convenient" or "when the maker is able," and the like, such clauses being construed to mean "within a reasonable time;" and the courts undertake to say what is a reasonable time, by the application of the rules of construction, which are used in the construction of ordinary contracts, containing similar clauses.[2] But it has been held by the Supreme Court of the United States, and by the English courts, that such notes are not negotiable, because the language used makes the payment conditional upon a contingency that may never happen.[3]

[1] See *post*, § 28.

[2] Sears *v.* Wright, 24 Me. 278 (payable "from the avails of logs bought of M. M, when there is a sale made;") Crooker *v.* Holmes, 65 Me. 195 ("when I sell my place where I now live;") Kincaid *v.* Higgins, 1 Bibb, 396 ("as soon as I can;") Works *v.* Hershey, 35 Iowa, 340; Lewis *v.* Tipton, 10 Ohio St. 88; Bowman *v.* McChesney, 22 Gratt. 609; Capron *v.* Capron, 44 Vt. 412 ("I promise to pay J. S. or bearer, $75 one year from date, with interest annually, and if there is not enough realized by good management in one year, to have more time to pay, in the manufacture of the plaster-bed on Stearns' land;") Ubsdell *v.* Cunningham, 22 Mo. 124 ("to be paid as soon as collected from my accounts at P.")

[3] Nunez *v.* Dantel, 19 Wall. 560 ("as soon as the crop can be sold, or the money raised from any other source;") Alexander *v* Thomas, 16 Q B. 333 ("payable ninety days after sight, or when realized.")

§ 25*c*. **Payment on return of note.** — A note, payable "on return of this receipt or note," has also been held to be negotiable, and payable, notwithstanding the receipt is not returned. In discussing the character of such a note, Church, C. J., said: "It contains an express promise to pay Feist or order a specified sum of money upon demand, with interest. These are the statutory elements of such a (negotiable) note.[1] The words 'on the return of this receipt,' do not make it payable upon a contingency, or constitute a condition precedent to any payment. * * * This restriction would be implied if not expressed; it is implied in every promissory note; and there is also an implied exception on account of mistake or accident. * * * This clause is not of the essence of the contract."[2] But where the phrase "payable on the return of my guaranty of a certain note," is added to a note, it will destroy its negotiability, because it imposes a condition which is not implied by the law of commercial paper.[3]

§ 25*d*. **Payment in default of installment.** — It is, also, somewhat common, in notes that are payable in installments, to provide that if the maker should fail to pay any one of the installments, the whole sum shall become due and payable. Such a note is held to be negotiable.[4] It is also sometimes provided in notes, that if any installment of interest should not be paid, the whole debt, principal and in-

[1] 1 R. S. 721, § 7.

[2] Frank *v.* Wessels, 64 N. Y. 158; Smilie *v.* Stevens, 39 Vt. 316; Blood *v.* Northrup, 1 Kan. 291. But see Hubbard *v.* Mosely, 11 Gray, 170, in which a note was held to be non-negotiable, because there was a condition added that "it shall be given up to the maker as soon as the amount is paid by the payee."

[3] Smilie *v.* Stevens, 39 Vt. 316; Blood *v.* Northrup, 1 Kan. 29.

[4] Carlon *v.* Kenealy, 12 M. & W. 139. See Miller *v.* Biddle, 13 L. T. R. 334. But the note must state the times when the installments are severally payable. Moffat *v.* Edwards, Car. & M. 16.

terest, shall then become due and payable. Such a note would undoubtedly be recognized as negotiable, there being no difference in principle between it and the note which is made to fall due upon the failure to pay an installment of the principal.

§ 26. **Payment out of a particular fund.** — In consequence of the uncertainty of payment which would result therefrom, it has invariably been held by the courts that a note or bill, payable out of a particular fund, is not negotiable, for the liability of the maker or drawer is conditional upon there being such a fund. There is in such a bill or note no absolute obligation to pay.[1] In such a case[2] Dwight, commissioner, said: "The present order, it should be observed, is payable out of an uncertain fund, from profits, and, of course, none may be realized. This fact

[1] Josselyn *v.* Lacier, 10 Mod. 294 (payable "out of any growing substance;") Clarke *v.* Percenal, 2 B. & Ad. 660; Worden *v.* Dodge, 4 Denio, 159 ("out of the net proceeds of certain ore;") out of certain claims, Richardson *v.* Carpenter, 46 N. Y. 661; Corbett *v.* State, 24 Ga 287; West *v.* Forman, 21 Ala. 400; Hoagland *v.* Erck, 11 Neb. 580; Harriman *v.* Sanborn, 43 N. H. 128 ("being the amount that came to you from B. to me;") Mills *v.* Kuykendale, 2 Blackf. 47 (out of my part of the estate of X.;) Kelly *v.* Bronson, 26 Minn. 359 (out of avails, when received, on sales of logs;) Pitman *v.* Crawford, 3 Gratt. 127 (on account of brick work done on a certain building;) Wadlington *v.* Covert, 51 Miss. 631; Corbett *v.* Clark, 45 Wis. 403 ("and take the same out of our share of the grain"); Averett's Adm'r. *v.* Booker, 15 Gratt. 165 ("out of any money in his hands belonging to me"). In this case Lee, J., said: "Here, the sum to be paid is not payable absolutely and at all events. It is payable out of a particular fund, to wit, the moneys, if any, in the hands of the drawee, belonging to the drawer. The draft, therefore, cannot be treated as a bill of exchange." Ehricks *v.* De Mill, 75 N. Y. 370 (on account of work done as per contract); Brill *v.* Tuttle, 81 N. Y. 457 ("and charge the same to our account for labor and materials, performed and furnished"), decided, however, to be non-negotiable in consideration of the other circumstances.

[2] Munger *v.* Shannon, 61 N. Y. 258 (and deduct the same from any share of the profits of the partnership).

deprives it of an element essential in a bill of exchange, which is that it be payable absolutely, and not upon a contingency. * * * I think that the true construction of the present order is, that it was an equitable assignment of a certain amount of the profits of the business." For the same reason, certificates or warrants of receivers of court are not negotiable, their payment being dependent upon the existence of a fund at the disposal of the court for that purpose.[1] But when, in a bill of exchange, the drawer simply indicates, by a reference to a special fund or account, that the drawee may reimburse himself, and does not intend that the payment of the bill should be conditional upon the existence or sufficiency of the fund, the bill will not be deprived of its negotiable character.[2] So, also, the insertion into a bill or note of memoranda, explaining the nature of the business or debt, for which the instrument is given, will not make it non-negotiable, for such a memorandum does not make the payment conditional.[3] So, also, a refer-

[1] Turner *v.* P. & S. R. R. Co., 95 Ill. 134; Union Trust Co. *v.* Chicago, etc., R. R. Co., 7 Fed. Rep. 513.

[2] Macleod *v.* Snee, 2 Strange, 762; 2 Ld. Raym. 1481 (payment was directed "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance"); Redman *v.* Adams, 51 Me. 433 ("and charge the same against whatever amount may be due for my share of fish"); see Brill *v.* Tuttle, 81 N. Y. 457; Ellett *v.* Britton, 6 Tex. 229 ("it will be in full of a certain judgment"). Martin *v.* Lewis, 30 Gratt. 672; Spurgin *v.* McPheeters, 42 Ind. 527. It is not essential to the negotiability of a bill that it must contain words indicating the account to which the amount called for by the bill must be charged. Laing *v.* Barclay, 1 B. & C. 392; 2 D. & R. 536; Jarvis *v.* Wilson, 46 Conn. 90. See Corbett *v.* Clark, 45 Wis. 403.

[3] Kirk *v.* Dodge County Mut. Ins. Co., 39 Wis. 138 (mem. that if note is not paid, whole of premium on insurance shall be considered, and the policy rendered void); Heard *v.* Dubuque Co. Bank, 8 Neb. 16 (that the title to an article purchased shall not pass, until the note given for the purchase-money is paid); "secured by mortgage;" Littlefield *v.* Hodge, 6 Mich. 326; Howey *v.* Eppinger, 34 Mich. 29; Roberts *v.* Jacks, 31 Ark. 597; Kelley *v.* Whitney, 45 Wis. 110; Duncan *v.* Louisville, 13 Bush, 385. For some special consideration, Collins *v.* Bradbury, 64 Me.

ence to collateral securities, with the terms of the deposit of them, will not affect the negotiability of a note or bill.[1]

§ 27. **Words of advice.** — Sometimes, but not so frequently in this country, as in England, a bill of exchange is directed to be paid "as per advice," or "without further advice." When the former clause appears, it is an intimation that the drawer has written and sent a letter of explanation; and if the drawee accepts, before receiving this letter of advice, he does so at his peril, in case of any alteration in the amount of the bill.[2] It is very doubtful whether the use of these words of advice is of any value at all. They cannot be permitted to make the liability of the drawer dependent upon the private instructions in the letter of advice, for that would destroy the negotiability of the bill. They can only serve to notify the drawee that a letter of advice has or has not been sent. And this notice could only be of value when it is not customary in commercial circles to send letters of advice.

§ 28. **Certainty as to the amount to be paid.** — Another essential to the negotiability of a bill or note is, that the amount to be paid on such paper must be certain and stated in the body of the note or bill. It is customary to write the sum of money in full in the body of the commercial paper, and also to express it in figures in the upper or lower left-

37; Mott *v.* Havana Nat. Bk., 22 Hun (N. Y.), 354; Preston *v.* Whitney, 23 Mich. 260; Wright *v.* Irwin, 33 Mich. 32; Newton Wagon Co. *v.* Dyers, 10 Neb. 284; Hereth *v.* Meyer, 33 Ind. 511 ("given in consideration of a patent-right").

[1] Wise *v.* Charlton, 4 A. & E. 788; Hassoullier *v.* Harkenck, 7 T. R. 733; Fancourt *v.* Thorne, 9 Q. B. 312; Towne *v.* Rice, 122 Mass. 67; Perry *v.* Bigelow, 128 Mass. 129; Arnold *v.* Rock River, etc., R. R. Co., 5 Duer, 207; Heerd *v.* Dubuque Co. Bank, 8 Neb. 16. See Fleckner *v.* Bank of U. S., 8 Wheat. 338.

[2] 1 Daniel's Negot. Inst., § 109; Byles on Bills, (*89) 141; Story on Bills, 65; Chitty on Bills, (*162) 187.

hand corner. But this statement of the amount in figures in the corner is a mere memorandum, and is not permitted to control the construction of the bill or note. Where there is a variance between the figures and the written words in the body of the paper, the written words will invariably determine the amount to be paid.[1] So immaterial is the marginal statement in figures of the sum to be paid that it has been lawful for any holder to change the figures, so that they may agree with the written statement of the amount in the body of the instrument.[2] Where, however, the statement of the amount in words is indistinctly written, reference may be made to the figures in the margin to explain the consequent obscurity;[3] and it will not be necessary, in the absence of a special statutory requirement, that the amount should be stated in words in the body of the instrument.[4] But if the amount is not stated at all in the body of the bill or note, not even in figures, the instrument is held in this country to be fatally defective.[5]

The amount for the payment of which the bill or note calls, must not only be stated in the body of the instrument; but it must also be certain. A bill or note for an indefinite sum, although the exact amount can be ascertained by a reference to other papers or accounts, is

[1] Commonwealth *v.* Emigrant Ins. Co., 98 Mass. 12; Smith *v.* Smith, 1 R. I. 398; Saunderson *v.* Piper, 5 Bing. (N. C.) 425; Mears *v.* Graham, 8 Blatchf. 144; Payne *v.* Clark, 19 Mo. 152; Riley *v.* Dickens, 19 Ill. 30.

[2] "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration, either material or immaterial, in the contract." Smith *v.* Smith, 1 R. I. 398.

[3] Riley *v.* Dickens, 19 Ill. 29; Corgan *v.* Frew, 39 Ill. 31.

[4] Sweetzer *v.* French, 13 Met. 262; Petty *v.* Fleispel, 31 Tex. 169.

[5] Norwich Bank *v.* Hyde, 13 Conn. 279. But see § 35, in respect to the authority to fill up blanks.

not negotiable.[1] But where the uncertainty or indefiniteness of the amount can be cured by a reference to some other part of the note, its back or its face, the paper will be treated as negotiable. An instrument has thus been held to be negotiable, which promised to pay a certain sum per acre for as many acres as a given tract contained, when the number of the acres was indorsed upon it.[2]

§ 28a. **Payable with exchange.** — Quite frequently the paper is made payable "with current exchange" on some other place than the place of payment. Since New York is the money center of this country, merchants frequently stipulate in their bills and notes for current exchange on New York. Although there are cases which hold that the addition of words calling for the payment of the current exchange on another place, will destroy the negotiable character of the bill or note, the weight of authority supports the negotiability of such an instrument, on the ground that the current exchange is common commercial information, and the exact amount to be paid "with exchange" may be easily ascertained by any holder of the bill on the day of payment.[4] It is true that a strict, techni-

[1] Smith *v.* Nightingale, 2 Stark. 375 (obligation to pay a specific amount "and all other sums which may be due"); Bolton *v.* Dugdale, 4 B. & Ad. 619; Jones *v.* Simpson, 2 B. & C., 318 ("the proceeds of a shipment of goods, value about £2,000, consigned by me to you"); Clark *v.* Percival, 2 B. & Ad. 660; Marset *v.* Equitable Ins. Co. 660 ("$800 and such additional premium as may be due on" certain policy); Legro *v.* Staples, 16 Me. 252; Lime Rock F. & M. Ins. Co. *v.* Hewitt, 60 Me. 407; Cashman *v.* Haynes, 20 Pick. 132 ("deducting all advances and expenses"); Gaar *v.* Louisville B. Co., 11 Bush, 180.

[2] Smith *v.* Clopton, 4 Tex. 109.

[3] Read *v.* McNulty, 12 Rich. 445; Russell *v.* Russell, 1 McArthur, 263; Low *v.* Bliss, 24 Ill. 168; Phila. Bank *v.* Newkirk, 2 Miles, 442. It is held in Illinois in later cases that when such words are added to a bill or note, made payable where it is drawn, they may be treated as mere surplusage. Hill *v.* Todd, 29 Ill. 103; Clauser *v.* Stone, 29 Ill. 116.

[4] Pollard *v.* Herries, 3 B. & P. 335; Grutacup *v.* Woulloise, 2 McLean,

cal application of the general rule, laid down in the preceding section, would require the courts to deny that bills and notes are negotiable, which are payable "with current exchange," for the reason that the rule requires the exact sum to be ascertained from facts stated in the body of the instrument.[1] But the reason of the general rule was to enable the holder or any one else, to ascertain the exact amount, not necessarily by facts stated within the body of the paper; but without investigating facts which were not within the general knowledge of every one, and which may be more or less subject to the influence or control of the maker or of the drawer or drawee. The rate of exchange between two places is determined by the relative demand for money in those places, and it can be ascertained by any one, desiring to know, by inquiring in banking circles. The practical effect of a bill or note, payable in one place with current exchange on another place, is the same at least as to the definiteness of the sum, as a note or bill, drawn in one place and payable in another place. For, in the latter case, the maker or drawee, must pay the full sum mentioned in the latter place; and therefore he pays the current exchange. In both cases, the expense of securing money in the latter place falls on the maker or drawee, and the only difference between the two cases is that in the former case the maker or drawee is only obliged, in making payment in one place, to pay the expense of transferring it to another place, instead of having to actually make pay-

581; Price *v.* Teal, 4 McLean, 201; Smith *v.* Kendall, 9 Mich. 241; Johnson *v.* Trisbie, 15 Mich. 286; Bullock *v.* Taylor, 39 Mich. 137; Leggett *v.* Jones, 10 Wis. 35; First Nat. Bank *v.* Dubuque S. R. R. Co., 52 Iowa, 378; Bradley *v.* Lill, 4 Biss. 473. See Nash *v.* Gibbon, 4 All. N. B. 479; Cazet *v.* Kirk, 4 All. N. B. 543; Palmer *v.* Fahnestock, 9 Up. Can. C. P. 172; Saxton *v.* Stevenson, 23 Up. Can. C. P. 503.

[1] In Leggett *v.* Jones, 10 Wis. 35, it was conceded that the recognition of the negotiability of such an instrument was "a slight modification of the general rule."

ment in the latter place. It would seem that whatever uncertainty as to the amount to be paid did exist in such a bill or note, it would not be sufficient to affect the rights of the parties to any material degree.[1]

§ 28*b*. **Stipulations to pay costs for collection.** — Bills and notes, particularly the latter, sometimes contain stipulations that, if not paid voluntarily, the drawer or maker will pay the attorney's and collection fees. It has been much discussed what is the effect of such a stipulation upon the legal character of the instruments, to which they are added. A few decisions maintain that the stipulation is in the nature of an usurious charge, and avoids the whole transaction under the laws prohibiting

[1] "A note is payable in lawful money of the United States, which is at par in every portion of the country. If a note is made payable in Milwaukee with exchange on New York, it requires precisely the same sum of money to pay it as would be required had it been made payable in New York. The exchange is the cost of drawing a bill and transmitting the money to New York to meet it. In Leggett *v.* Jones, the note was payable at the Dodge County Bank with exchange on New York. Had the note been made payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense, uncertain in amount, of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence, the same sum of money which would have been required to pay the note in New York, would have paid it at the Dodge County bank, including the exchange, according to its terms. In speaking of the cost of exchange, we refer only to transactions in money. Nominally, the cost of exchange may include the discount on the ordinary currency of the place where the bill is drawn, at the place of payment, and such discount may greatly fluctuate. But a note payable with exchange is not affected by those facts, for it cannot be payable in anything but money (unless by virtue of some special statutory provision) and still be a note. There can be no discount on money to affect the cost of inland exchange. Hence, it may well be said, that the uncertainty in the amount due on a note which stipulates for the payment of exchange between two points, is rather apparent than real and substantial." Lyon, J., in Morgan *v.* Edwards, 53 Wis. 599 (40 Am. Rep. 781).

usury.[1] Other decisions hold the stipulation to be void, as against public policy, because it is in the nature of a penalty, and tends to the oppression of impecunious debtors. But the avoidance of the stipulation on such grounds enables the courts to treat the stipulation as mere surplusage, and hold the instrument to be negotiable notwithstanding.[2] In a large number of cases, the stipulation is held to be valid; but, because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability;[3] but there are also other cases, which not only recognize the validity of the stipulation, but also the negotiability of the paper, in which it appears.[4]

[1] State *v.* Taylor, 10 Ohio, 378; Shelton *v.* Gill, 11 Ohio, 417; Dow *v.* Updike, 11 Neb. 95.

[2] Meyer *v.* Hart, 40 Mich. 517; Bullock *v.* Taylor, 39 Mich. 138; Gaar *v.* Louisville Banking Co., 11 Bush, 182; Witherspoon *v.* Musselman, 14 Bush, 814. See Kemp *v.* Claus, 8 Neb. 24.

[3] Sweeney *v.* Thickstun, 77 Pa. St. 131; Woods *v.* North, 84 Pa. St. 410; Johnston *v.* Speer, 92 Pa. St. 227; First Nat. Bk. *v.* Bynum, 84 N. C. 24; First Nat. Bk. *v.* Gay, 63 Mo. 33; Samstag *v.* Conley, 64 Mo. 477; First Nat. Bk. *v.* Marlow, 71 Mo. 618; Storr *v.* Wakefield, 71 Mo. 622; First Nat. Bk. *v.* Gay, 71 Mo. 627; Morgan *v.* Edwards, 53 Wis. 599; Jones *v.* Raditz, 27 Minn. 240. "It is a necessary quality of negotiable paper, that it should be simple, certain, unconditional, and not subject to any contingency * * * Interest and costs of protest at non-payment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the no e would not alter its negotiability. Neither does a clause waiving exemption, for that in no way touches the simplicity and certainty of the paper. But a collateral agreement as here ('and five per cent collection fees if not paid when due'), depending too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different." Sharswood, J., in Woods *v.* North, *supra.*

[4] Dietrich *v.* Baylie, 23 La. Ann. 767; Overton *v.* Matthews, 35 Ark. 147; Smith *v.* Muncie Nat. Bk., 29 Ind. 159; First Nat. Bk. *v.* Canatsey, 34 Ind. 149; Johnson *v.* Crossland, 34 Ind. 344; Smith *v.* St. Silvers, 32 Ind. 321; Wyant *v.* Porttorff, 37 Ind. 512; Hubbard *v.* Harrison, 38 Ind. 325; Walker *v.* Woollen, 54 Ind. 164; Sperry *v.* Horr, 32 Iowa, 184; Seaton *v.* Scoville, 18 Kan. 435; Howestein *v.* Barnes, U. S. C. C. Kansas, 29 Am. Rep. 406; *s. c.* 5 Dillon 482; Heard *v.* Dubuque Bank, 8 Neb. 10; Farmers' Nat. Bk. *v.* Rasmussen, 1 Dakota, 60; Wilson Sewing Ma-

Where the amount, to be recovered as attorney's fees, is explicitly stated in the instrument,[1] it would seem that the

chine Co. *v.* Moreno, U. S. C. C. Oregon, 29 Am. Rep. 406; *s. c.* 7 Fed. Rep. 806. In Stoneman *v.* Pyle, 35 Ind. 103, the court, through Worden, J., explained fully the grounds upon which the negotiability of such instruments may be sustained, as follows: "As the note was payable at a bank in this State, it is governed by the law merchant, and the holder thereof is entitled to all the rights of a holder of commercial paper, unless the clause in the note stipulating for the payment of attorney's fees, in case suit should be commenced thereon, takes it out of that class of paper. It is earnestly urged by counsel for the appellee, that the provision above indicated makes the amount of the note uncertain, and therefore that it does not come within the legal requirements of commercial paper. It may be conceded that a note, in order to be placed upon the footing of bills of exchange, must be for a sum certain; for in no other way can the maker know precisely what he is bound to pay, or the holder what he is entitled to demand. But the note in question, if paid at maturity, or after maturity before suit is brought thereon, is for a sum certain. On the maturity of the note the maker knew precisely what he was bound to pay, and the holder what he was entitled to demand. In the commercial world, commercial paper is expected to be paid promptly at maturity. The stipulation for the payment of attorney's fees could have no force, except upon a violation of his contract by the defendant. Had the defendant kept his contract and paid the note at maturity, or afterwards, but before suit, he would have been required to pay no attorney's fees, nor would there have been any difficulty as to the extent of his obligation. We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character." In Indiana, it is now provided by statute, 1 Rev. Stat. (1876), p. 149, "that any and all agreements to pay attorney's fees, *depending upon any condition therein set forth*, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void, provided that nothing in this section shall be construed as applying to contracts made previous to the taking effect of this act." Under this act, it was held that a stipulation was void, which provided for the payment of attorney's fees "if suit be brought." Churchman *v.* Martin, 54 Ind. 380. But if the stipulation is made unconditional, it will not come within the operation of the statute, and is therefore valid. Brown *v.* Barber, 59 Ind. 533; Smock *v.* Ripley, 62 Ind. 81. See Garver *v.* Pontius, 66 Ind. 191; Maxwell *v.* Morehart, 66 Ind. 301.

[1] See Sperry *v.* Hunt, 32 Iowa, 184; Overton *v.* Mathews, 35 Ark. 147;

sum of money, to be recovered on the paper, with the attorney's fees added to the principal and interest, would be as certain as the principal and interest would be alone. For the interest continues to accumulate, if the paper is not honored at maturity.[1] When the exact amount of the fees is not stated, only reasonable fees can be recovered, and there may be some ground for objecting to the negotiability of such an instrument. But it would seem that even such an instrument ought to be held to be negotiable, for the stipulation for reasonable attorney's fees renders the amount no more uncertain than the addition by the law merchant to the principal sum of the costs of protest, and the taxed costs of the suit. The only difference between the two *addenda* is that the attorney's fees are not yet customarily demanded, and hence must be expressly stipulated for; while the payment of costs of protest is a custom, grown into a requirement of the law. The stipulation for attorney's fees is only a more youthful provision.

§ 29. **Payment in money only.**— It is also a requisite of negotiability, that the instrument should call only for the payment of money. If the paper should provide for the payment of money or the doing or buying of something else in liquidation of the indebtedness, it is deprived of the character of negotiability, and becomes an ordinary contract or order.[2] Money is defined, generally, to have been

Dietrich *v.* Baylie, 23 La. Ann. 767; Farmers' Nat. Bank *v.* Rasmussen, 1 Dakota, 60.

[1] But see, *contra*, Wood *v.* North, 84 Pa. St. 410; First Nat. Bk. *v.* Gay, 63 Mo. 33; Sweeney *v.* Thickstun, 77 Pa. St. 131.

[2] "*Foreign bills*," Jones *v.* Fales, 4 Mass. 245; Young *v.* Adams, 6 Mass. 182; promise to pay $1,000 *or upon surrender of note to issue stock, etc.*, Hodges *v.* Shuler, 22 N. Y. 114; "*in good merchantable whisky at trade price*," Rhodes *v.* Lindley, Ohio Cond. 465; in work, Quinby *v.* Merritt, 11 Humph. 439; payable in money or in goods on demand, Hosstater *v.* Wilson, 36 Barb.; "*in ginned cotton at eight cents per pound*," Lawrence *v.* Dougherty, 5 Yerg. 435. See to same effect Matthews *v.* Houghton,

originally, the synonym of coin; pieces of metal stamped by public authority, and used as the medium of commerce (Webster). But when government notes and other paper currency came into use, and were declared by law to be legal tender in payment of all debts, public and private,[1] its legitimate derivative meaning would include all species of legal tender. The term "currency" is a more comprehensive term, and includes not only legal tender or money, but everything else which is in circulation or is given and taken as having value, or as representing property. For example, national bank-notes would be currency, but not money, because they are not legal tender; although in the popular mind, this distinction is not recognized or understood, the terms "money" and "currency" being treated as synonymous.

§ 29a. **Payable in bank-bills or currency.** — It has become quite common to make commercial paper payable in bank-bills, in current funds, in currency and the like; and it is very difficult to determine whether such paper should be considered negotiable. Since Congress has declared the United States treasury notes to be legal tender, the claim is made that when the paper is payable "in currency," "in current funds," etc., the parties meant the legal tender of the country.[2] But this would seem to be a violent presumption, and not at all supported by the history of the

2 Fairf. 377; Dixon *v.* Bovill, 3 Macq. H. L. 1; Averbach *v.* Pitchett, 58 Ala. 451.

[1] As to the power to declare such notes legal tender in the United States, see Tiedeman's Limitations of Police Power, § 90.

[2] The objection that the instrument is not a promissory note because payable in paper currency, is answered by the suggestion that this must be taken to refer to the legal tender paper currency, which under the United States laws and decisions is money." Church, Ch. J., in Frank *v.* Wessels, 64 N. Y. 158. See, to same effect, Burton *v.* Brooks, 25 Ark. 215. See also Fry *v.* Dudley, 20 La. Ann. 368.

question; for, if no other currency but legal tender was intended, the express stipulation was useless and served no purpose, since commercial paper is payable in legal tender independently of any express provision.[1] It may be permissible to show by parol evidence that the word "currency" was used in the sense of "money;"[2] but in the absence of such evidence, it is hardly proper for a court to declare them synonymous, especially when it is known, that the confusion between the terms has arisen out of the state bank-note circulation, that was so common in this country fifty years ago. At all events, this reasoning would furnish no justification for the conclusions of some of the courts that a bill or note was negotiable, which was payable in bank-notes.

It has also been frequently held, with much greater show of reason, that instruments are nevertheless negotiable, although they are expressed to be payable "in current money," "in good current money" and the like, it being presumed that nothing but legal tender was intended.[3] And it is not objectionable to the character of commercial paper, that it is payable in some special kind of legal tender, as for example "in gold coin."[4] In En-

[1] "It is evident that it was not intended that payment should be made in coin or 'legal tender' government notes. The holder of the paper could have demanded payment thereon in 'legal tender' money without any words in the instrument indicating the currency in which payment should be made. * * * Some other medium of circulation is described by the word currency." Beck, J., in Huse *v.* Hamblin, 29 Iowa, 244.

[2] Haddock *v.* Woods, 46 Iowa, 435; Pilmer *v.* Branch Bk., 16 Iowa, 321; Huse *v.* Hamblin, 29 Iowa, 501.

[3] "*In lawful current money of Pennsylvania*," Wharton *v.* Morris, 1 Dall. 124; "*in good current money of this State*," Graham *v.* Adams, 5 Ark. 261; "*Arkansas money*," Wilburn *v.* Greer, 6 Ark. 255; "*Tennessee money*," Searcy *v.* Vance, Mart. & Y. 225; Black *v.* Ward, 27 Mich. 173; "*current money of Alabama*," Carter *v.* Penn, 4 Ala. 140; but otherwise, if payable "*in Arkansas money of the Fayetteville branch*," Hawkins *v.* Watkins, 5 Ark. 481.

[4] Chrysler *v.* Pendis, 42 N. Y. 209.

gland, commercial paper payable in notes of the bank of England, is held to be non-negotiable,[1] and in many of the American courts, instruments payable in any other currency than legal tender have been denied the negotiable character.[2] But in very many other cases such instruments have been declared to be negotiable.[3]

[1] Rex *v.* Wilcox, Bayley on Bills, 11; ex parte Imeson, 2 Rose, 225. It seems that the opinion of the English courts was not affected by the fact that these bank-notes were by act of Parliament made legal tender. Rex *v.* Wilcox, *supra;* 1 Daniel's Negot. Inst., § 57; 1 Ames on B. & N. 39. The same position is taken by the Canada courts, in respect to Canada bills, which are legal tender under Stat. 29 & 30 Vict., ch. 10. Gray *v.* Worden, 29 Up. Can. Q. B. R. 535.

[2] "*Office notes*" of a bank, Irvine *v.* Lowry, 14 Pet. 293; "*in current bills*," Collins *v.* Lincoln, 11 Vt. 268; Ford *v.* Mitchell, 15 Wis. 304; "in current bank-bills or notes," McCormick *v.* Trotter, 10 Serg. & R. 94; Fry *v.* Rousseau, 3 McLean, 106; Gamble *v.* Hatton, Peck, 130; Kirkpatrick *v.* McCullough, 3 Humph. 171; Whiteman *v.* Childress, 6 Humph. 303; Simpson *v.* Moulders, 3 Caldw. 429; McDonnell *v.* Keller, 4 Caldw. 258; Little *v.* Phœnix Bk., 2 Hill, 425; Gray *v.* Donahue, 4 Watts, 400; "*in currency*," Rindskoff *v.* Barrett, 11 Iowa, 172; Farwell *v.* Kennett, 7 Mo. 595; Lampton *v.* Haggard, 3 Monr. 149; Mobile Bank *v.* Brown, 42 Ala. 108; "*in common currency of Arkansas*," Dillard *v.* Evans, 4 Ark. 185; "*in current funds*," Johnson *v.* Henderson, 76 N. C. 227; Cornwell *v.* Humphrey, 9 Ind. 135; Lafayette Bank *v.* Ringel, 51 Ind. 393; Haddock *v.* Woods, 46 Iowa, 433; Platt *v.* Sauk Co. Bk., 17 Wis. 222; Lindsey *v.* McClelland, 18 Wis. 481; "*in current funds of Pittsburgh*," Wright *v.* Hart, 44 Pa. St. 454; "in current bank paper," Campbell *v.* Weister, 1 Litt. 30; "*in paper medium*," Lange *v.* Kohne, 1 McCord, 115; "*in current notes of the State of North Carolina*," Warren *v.* Brown, 64 N. C. 381; "*in Pennsylvania or New York paper currency*," Lieber *v.* Goodrich, 5 Cow. 186; "*in notes receivable in bank*," Breckenridge *v.* Ralls, 4 Mon. 533.

[3] "In funds current" or current in place of payment, Shoemakers' Bk. *v.* Street, 16 Ohio St. 5; White *v.* Richmond, 16 Ohio, 5; Lacy *v.* Holbrook, 4 Ala. 88; in bank-notes, Judah *v.* Harris, 19 Johns. 144; Deberry *v.* Darnell, 5 Yerg. 451; Pardee *v.* Fish, 60 N. Y. 265; Morris *v.* Edwards, 1 Ohio, 80; Swetland *v.* Creigh, 15 Ohio, 118; Fleming *v.* Nall, 1 Texas, 246; "*in currency*," Drake *v.* Markle, 21 Ind. 433; Ehle *v.* Chittenango Bk., 24 N. Y. 548; Howe *v.* Hartness, 11 Ohio St. 449; Peru *v.* Farnsworth, 18 Ill. 563; Laughlin *v.* Marshall, 19 Ill. 390; Swift *v.* Whitney, 20 Ill. 144; Hunt *v.* Divine, 37 Ill. 137; Cockrell *v.* Kirkpatrick,

§ 29*b*. **Payable in foreign money.** — It is not necessary that the note or bill be payable in the money of the place where the instrument was executed or is to be paid. It may be payable in the money of any known nation, the only requirement being that the particular denomination of the foreign money which the parties contemplate should be stated in the body of the instrument so that it may be ascertained at once by a perusal of the instrument what is the equivalent value. In New York, a note was held to be non-negotiable, which was given for a certain sum in dollars and cents "payable in Canada money." The court held that the sum to be paid should be expressed in the denomination of the foreign money, instead of in the native denomination and declared to be payable in the foreign money. The court proceeded to say further: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument, is to aver and prove the value of the sum expressed, in our own tenderable coin.[1] The main point in the New York case is that, while the amount of the note or bill may be expressed in the foreign denomination, the paper will cease to be negotiable, if the maker or drawee is required to pay in the foreign denomination, instead of tendering the same sum in the native

9 Mo. 688; Mitchell *v.* Hewitt, 5 Smed. & M. 361; Fry *v.* Dudley, 20 La. Ann. 368; Butler *v.* Paine, 8 Minn. 324; Klauber *v.* Biggerstaff, 47 Wis. 551; Phelps *v.* Town, 14 Mich. 374; "*in New York State bills or specie*," Keith *v.* Jones, 9 Johns. 120.

[1] Thompson *v.* Sloan, 23 Wend. 71. See Sanger *v.* Simpson, 8 Mass. 260.

denomination. But where the denominations of two countries have the same names but different values, — as was the case with the money of Canada and of the United States after the American civil war, when the paper money of the latter was depreciated in value below the gold standard; — it will not affect the negotiability of an instrument if it is expressed to be payable "in Canada currency" or "Canada money," since some such expression is necessary to denote the exact amount to be paid, and is not intended to require that it shall be actually paid in Canada money. It means, simply, that the value of the stated amount of Canadian dollars and cents should be given in liquidation of the indebtedness.[1] When a note or bill is executed anywhere in the United States, and is given for a certain number of dollars and cents, the presumption is conclusive that the parties meant the lawful money of the United States, and as a general rule it will not be permitted to show by extraneous evidence that some other denomination was intended.[2]

[1] "A note payable in Canada currency means no more and no less than that it is payable in Canada money at the Canada standard, and that it is governed as to the amount it calls for by the same rules as if it had been made in Canada, and payable in so many dollars, without containing any further direction. * * * It is evident the language was used to exclude the idea that it should be paid in dollars according to our paper standard, and to put it on the footing of a gold contract. * * * It is urged that this is superfluous, and that as every one is presumed to know the law, it would not have been put in except for some purpose which would change its legal import. The objection appears to us to be far-fetched and unreasonable. This case cited above sufficiently answers it. A very large proportion of the bonds and deeds drawn up in this country describe the money secured or paid as 'lawful money of the United States,' when there can be no other lawful money in the republic, and when it is clearly superfluous." Campbell, J., in Black *v.* Ward, 27 Mich. 193.

[2] Bank *v.* Supervisors, 7 Wall. 26; Thorington *v.* Smith, 8 Wall. 12; Stewart *v.* Salmon, 94 U. S. 434; Cook *v.* Lillo, 103 U. S. 793; Lohmann *v.* Crouch, 19 Gratt. 321; Wilcoxen *v.* Reynolds, 46 Ala. 529; Hightower *v.* Maull, 50 Ala. 495.

Hence the need of stating that the instrument is payable in money of the same denomination.

§ 29c. **Payable in money of Confederate States.** — But an anomalous exception to this general rule arose out of the war between the States. Upon the formation of the Southern Confederacy and the establishment of its government, treasury notes, of the same denominations and values as the United States money, were isssued in great quantities; and with the decline in the prospects of Southern victory the value of this paper currency was depreciated, until it was reduced to zero by the surrender at Appomattox. But wherever the Confederate government was in power, this currency constituted almost the sole medium of exchange, and people made their contracts in the expectation of being paid in the money of the Confederate States. When the war was brought to a close by the success of the Union forces, and thus practically stamped the attempted secession from the Union as an unlawful rebellion, there could not be any doubt as to the illegality of the Confederate money, the Confederate government itself being declared to be an unlawful assemblage of men. If the rule, above stated, had been applied with all its strictness to the contracts made within the Confederate lines, the courts must have held that they called for the payment of so many dollars "of the lawful money of the United States," although the parties had contemplated the payment in the depreciated currency of the defunct Southern Confederacy. This conclusion would have been logical, and irresistible from the given premises, but it would have worked hardship and injustice upon private individuals. The courts, in their effort to mete out justice rather than to be logical, have held that, although in the absence of evidence to the contrary it is the presumption of law that in such contracts the parties meant by dollars and cents the lawful money of

the United States, and nothing else;[1] yet, if the parties were contemplating payment in the Confederate currency, the States within the control of the Confederate government will be considered as being then so far foreign to the United States, as to permit parol evidence to establish this intention of the parties, in rebuttal of the general presumption.[2] In all such cases, the sum payable in the lawful money of the United States must be ascertained by the determination of the value in such money of the Confederate currency at the time and place, when and where the note or contract was made.[3]

[1] The Confederate Note Case, 19 Wall. 548.

[2] "It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country coins or notes denominated dollars should be authorized, of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence, may be removed by parol evidence." Chase, Ch. J., in Thorington *v.* Smith, 8 Wall. 12. In this case, the note was given in Alabama, within the Confederate lines, for $10,000, and the court held that since according to the evidence Confederate dollars were intended, only that amount of United States money should be paid in liquidation of the indebtedness, which would be the equivalent in value of that amount of Confederate money. See, to same effect, Confederate Note Case, 19 Wall. 548; Stewart *v.* Salomon, 94 U. S. 434; Cook *v.* Lillo, 103 U. S. 793; Wilmington, etc., R. R. Co. *v.* King, 91 U. S. 3; Lohman *v.* Crouch, 19 Gratt. 331; Donley *v.* Tindall, 32 Tex. 43.

[3] Stewart *v.* Salomon, 94 U. S. 434. In South Carolina, and perhaps in other of the Southern States, the value of Confederate money at different times during the war is regulated by statutory provisions, which take the place, and avoid the necessity of the actual proof of its value in any special case. See Rev. Stat. S. C. (1873), pp. 310–318.

§ 29*d*. **Denomination stated in body of paper.** — The denomination of money must, as a rule, be stated in the body of the instrument. But if the name of the denomination should be omitted in the body of the paper, but the denominational mark, for example, "£," or "$,' should be given in the marginal annotation of the amount, that will be sufficient, and any holder may add the name in the body of the paper.[1]

§ 29*e*. **Collateral obligations.** — It has already been stated that, in order that a note or bill may have the character of negotiability, it must call only for the payment of money. Under this rule, it has frequently been held that a contract is not negotiable which stipulates some other obligation than the payment of money, as, for example, the transfer of certain property or the performance of certain work.[2] At one time this rule was rigidly enforced and no permissible exceptions were recognized. But of late a tendency is manifested by the courts to relax the rule, so far as to permit collateral obligations to be incorporated into a note or bill, without affecting its negotiable character, which are designed to facilitate its collection, or in some other way increase the security of the holder. Thus, it has

[1] Rex *v.* Elliott, 2 East P. C. 951; Coolbroth *v.* Purinton, 29 Me. 469; Northrop *v.* Sanborn, 22 Vt. 433; Sweetzer *v.* French, 13 Met. 262; Burnham *v.* Allen, 1 Gray, 469; Booth *v.* Wallace, 2 Root, 247; Harman *v.* Howe, 27 Gratt. 677; McCoy *v.* Gilmore, 7 Ohio, 268; Corgan *v.* Frew, 39 Ill. 31; Williamson *v.* Smith, 1 Cold. 1; Murrill *v.* Handy, 17 Mo. 406; Beardsley *v.* Hill, 61 Ill. 354.

[2] Contract to pay a sum of money and to deliver up certain property, Martin *v.* Chauntry, 2 Strange, 1271; the payment of money and the performance of certain work, Fetcher *v.* Thompson, 55 N. H. 208; payment of a certain sum and the liquidation of certain other debts or obligations, Ayrey *v.* Fearnsides, 4 Mees. & W. 168; Cook *v.* Satterlee, 6 Cow. 108; a certain sum for the hire of a negro "said negro to be furnished with the usual quantity of clothing," Barnes *v.* Gorman, 9 Rich. 297 (*contra*, Baxter *v.* Stewart, 4 Sneed, 213; Gaines *v.* Shelton, 47 Ala. 413); see, also, *ante*, § 29.

been quite common to insert in promissory notes an authority to the holder or some one else, in default of payment, to confess judgment for the amount of the note. So, also, is it somewhat customary to include in such paper a waiver of the benefit of appraisement and exemption laws, and other statutory provisions designed for the protection of the debtor. At first, the courts were designed to hold that the insertion of such stipulations would destroy the negotiability of the note.[1] But these stipulations have become more

[1] Overton *v.* Tyler, 3 Barr, 346. In this case, the note was as follows: "For value received, I promise to pay Francis Tyler and Levi Westwood, or bearer, one thousand dollars with interest, by the first day of June next. And I do hereby authorize any attorney of any court of record in Pennsylvania to appear for me and confess judgment for the above sum to the holder of this single bill, with costs of suit, hereby releasing all errors and waiving stay of execution, and the right of inquisition on real estate; also waiving the right to have any of my property appraised which may be levied upon by virtue of any execution issued for the above sum." In pronouncing this note to be non-negotiable, Gibson, Ch. J., said: "A negotiable bill or note is a courier without luggage. It is requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it and destroy it. But a memorandum, which is merely directory or collateral will not affect it. The warrant and stipulations incorporated with this note evince that the object of the parties was not a general, but a special one. * * * A warrant to confess judgment, not being a commercial instrument or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee, for the benefit of the transferee. I am unable to see how it would authorize him to enter a judgment, for the use of another, on a note with which he had parted. But it may be said that his transfer would be a waiver of the warrant as a security for himself or any one else; and that subsequent holders would take the note without it. The principle is certainly applicable to a memorandum indorsed after signing or one written on a separate paper. But the appearance of a paper with such unusual stipulations incorporated with it would be apt to startle commer-

common since the day when the case of Overton *v.* Tyler was decided; "and the declaration of Chief Justice Gibson in that case, that 'a negotiable bill or note is a courier without luggage' is answered by the assertion that such provisions facilitate rather than encumber the circulation of such instruments. They are not luggage, but ballast."[1] Such stipulations are now generally held to have no effect upon the negotiable character of the instrument in which they appear.[2] It has also been held that any holder of such a negotiable instrument may claim the benefit of such stipulations.[3]

§ 30. **The place of payment.**— If no place of payment is mentioned in the commercial paper, then it is payable at the place of business of the payor, and at his residence, if he has no place of business or office. If the paper be a note, it is payable at the place of business or residence of the maker, and if it is a bill of exchange, at that of the drawee and acceptor.[4] But if a foreign bill is drawn upon one, and

cial men as to their effect on the contract of indorsement and make them reluctant to touch it. All this shows that these parties could not have intended to impress a commercial character on the note, dragging after it, as it would, a train of special provisions which would materially impede its circulation."

[1] 1 Daniel Negot. Inst. § 61.

[2] "It is urged that the words 'waiving the right of appeal and of all valuation, appraisement, stay and exemption laws,' destroys its negotiability. In what way? They do not contain any condition or contingency, but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note." Read, J., in Zimmerman *v.* Anderson, 67 Pa. St. 421. See, to same effect, Clements *v.* Hull, 35 Ohio St. 141; Walker *v.* Woollen, 54 Ind. 164.

[3] Clements *v.* Hull, 35 Ohio St. 141.

[4] But if the drawer directs on the face of the bill that it is to be paid at his habitation, the instrument is presumed to be accommodation paper, and demand may be made upon him for payment. Sharp *v.* Bailey, 9 B. & C. 44.

is addressed to the drawee at one place or another, in the alternative, the place of payment will be presumed to be where he accepted the bill.[1] If the place of payment is named in the instrument, as is frequently the case, the presentment must be made at that place; and while it is not necessary, in order to hold the maker of a note or acceptor of a bill, to present the paper for payment at the stated place of payment, unless it is expressed to be payable at the stated place "only and not elsewhere," — and even then the failure to present at that place will only prevent the accrument of interest, and relieve the debtor of liability for costs of protest,[2] — it is necessary in order to hold the indorsers and other persons secondarily liable on the paper. If the presentment is not made at the stated place, the indorsers, drawer and sureties are discharged.[3]

The statement of a place of payment is usually not a requisite to the negotiability of a note or bill. But by statute, in some of the States, it is now required that, in order that a note may be negotiable, the place of payment must be specified in the body of the instrument.[4]

[1] Freese *v.* Brownell, 35 N. J. L. 285; Cox *v.* National Bank, 100 U. S. 713.

[2] Wallace *v.* McConnell, 13 Pet. 136; Cox *v.* National Bank, 100 U. S. 714; Ruggles *v.* Patten, 8 Mass. 480; Caldwell *v.* Cassidy, 8 Cow. 271; Hills *v.* Place, 48 N. Y. 520; Reeve *v.* Pack, 6 Mich. 240. *Contra*, Sanderson *v.* Bowes, 14 East, 500. See *post*, chapters on Presentment, for a fuller statement of the proposition.

[3] Bank of the United States *v.* Smith, 11 Wheat. 171; Cox *v.* National Bank, 100 U. S. 712; Shaw *v.* Reed, 12 Pick. 132; Watkins *v.* Crouchl, 5 Leigh, 522; Brown *v.* Hull, 23 Gratt. 27; Lawrence *v.* Dobyns, 30 Mo. 196. See *post*, chapters on Presentment.

[4] Crossman *v.* May, 68 Ind. 242; Salmons *v.* Hoyt, 53 Ga. 493; Oates *v.* National Bank, 100 U. S. 239 (construing Alabama statute). In Indiana the statutory requirement, that the note must be payable at or in a bank, was not sufficiently complied with, if the note is payable "at Indiana Banking Co." Rominger *v.* Keyes 73 Ind. 376. In Virginia, where by statute a negotiable note is required to be payable at a particular bank or business office (Code of 1873, ch. 141 §, 7), it was held that

§ 31. **Acknowledgment of consideration** — It is an almost invariable custom to insert in commercial paper the words "value received," or others of like import, as an acknowledgment of the receipt of a consideration from the payee. And, although these or like words were considered to be necessary to the negotiability of bills of exchange, according to the law merchant,[1] it is now very generally held in England and in the United States, that an acknowledgment of consideration is not necessary to the negotiability of bills of exchange or of promissory notes unless the statute, which makes promissory notes negotiable, stipulates that such an acknowledgment is necessary.[2] When the words "value received" are contained in a note, it is conclusive that they are intended to indicate that the maker has received a valuable consideration from the payee.[3] But when they appear in a bill of exchange, the meaning of them is somewhat doubtful. If the bill is drawn payable to the order of a third person, it may mean, either that the drawer has received value from the payee, or that

a particular bank or office must be mentioned in the note; and that a note was not negotiable, which was made payable "at either of the banking houses in Wheeling, Va." Freeman's Bank *v.* Ruckman, 16 Gratt. 126. See Spitler *v.* James, 32 Ind. 203; Gillaspie *v.* Kelly, 41 Ind. 158.

[1] Cramlington *v.* Evans, 1 Show. 5; Vin. Ab., Bills of Exchange, G., 2; Byles on Bills, *85; 1 Daniel's Negot. Inst., § 108.

[2] Popplewell *v.* Wilson, 1 Stra. 264, note; White *v.* Ledwig, 4 Dougl. 427; Grant *v.* DaCosta, 3 M. & S. 351; Macleod *v.* Snee, 2 Ld. Raym. 1481; Hatch *v.* Frayes, 11 Ad. & El. 702; Kendall *v.* Galvin, 15 Me. 131; Benjamin *v.* Fillman, 2 McLean, 213; Townsend *v.* Derby, 3 Metc. 263; Arnold *v.* Sprague, 34 Vt. 402; Hughes *v.* Wheeler, 8 Cow. 77; Underhill *v.* Phillips, 10 Hun (N. Y. S. C.) 591; Hubble *v.* Fogartie, 3 Rich. 413; People *v.* McDermott, 8 Cal. 288; 1 Parson's N. & B. 193. In Missouri, the statutory provisions require the words "value received" to be incorporated in promisory notes, but they are not necessary to the negotiability of bills of exchange. Lowenstein *v.* Knoff, 2 Mo. App. 159; International Bank *v.* German Bank, 3 Mo. App. 362; Bailey *v.* Smock, 61 Mo. 213.

[3] Clayton *v.* Gosling, 5 B. & C. (11 E. 'C. L. R.) 361; *s. c.* 8 D. & R. 110.

the acceptor has received the value from the drawer. But, ordinarily, the words are presumed to be an acknowledgment of consideration by the drawer from the payee.[1] If the bill is payable to the drawer's own order, the more reasonable presumption is that these words constitute an acknowledgment or declaration of consideration from the drawer to the acceptor.[2]

There is usually only a general acknowledgment of consideration by the use of the words "value received" or of other like phrases. But sometimes a particular consideration is mentioned, and if it be a sufficient one, according to the law of consideration,[3] the instrument will be negotiable.[4]

§ 32. **Sealed instruments not commercial paper.** — The weight of authority is decidedly in favor of the proposition that, in the absence of statutory regulations to the contrary, sealed instruments cannot be included in commercial paper: that it is a requisite not only of bills of exchange,[5] but, also, of promissory notes,[6] that they must be "open letters," that is, unsealed. The reason for this conclusion seems to be that sealed instruments are ancient and of common-law origin, and, according to the common law, could not be assigned or transferred. Whereas, bills of ex-

[1] Grant *v.* Da Costa, 3 M. & S. 351.

[2] Highmore *v.* Primrose, 5 M. & S. 65.

[3] See *post*, chapter on Consideration.

[4] Jury *v.* Barker, El. B. & El. 459; Shenton *v.* James, 5 Q. B. 199; Sylvester *v.* Staples, 44 Me. 496; Corbett *v.* Clark, 45 Wis. 403.

[5] Conine *v.* Junction & B. R. Co., 3 Houst. 289; Story on Bills, § 62. But see, *contra*, Irwin *v.* Brown, 2 Cranch C. C. 314.

[6] Warren *v.* Lynch, 5 Johns. 239; Clark *v.* Farmers' Manuf'g Co., 15 Wend. 256; Hopkins *v.* Railroad Co., 3 Watts & S. 410; Clegg *v.* Lemesurier, 15 Gratt. 108; Mann *v.* Sutton, 4 Rand. 253; Parks *v.* Duke, 2 McCord, 380; Lewis *v.* Wilson, 5 Blackf. 369; Helper *v.* Alden, 3 Minn. 332. Where the note is signed by some of the parties with, and by others without, a seal, it will be a specialty contract as to the former, while it will be treated as a promissory negotiable note against the latter. Rankin *v.* Roler, 8 Gratt. 63.

change and promissory notes, being products of mercantile custom, were originally executed, as a rule, without seals. If, therefore, one should execute a sealed instrument, it would be conclusive proof that he did not intend to make a negotiable bill or note.[1] Hence, although sealed instruments, with *choses in action* in general, are now made assignable by statute in most of the States, they are under this rule denied the peculiar qualities of negotiability. The rule has been held to apply to corporations, as well as to natural persons, so that the affixing of the corporate seal destroys the negotiability of the paper.[2] But the tendency at the present day is to hold that the use of the corporate seal in the execution or indorsement of a bill or note does not affect its negotiability, since "the seal of a corporation is not in itself conclusive of an intent to make a specialty. It is equally appropriate as the means of evidencing the assent of a corporation to be bound by a simple contract as by a specialty." [3]

[1] "Deeds or sealed instruments are not only of a much higher antiquity than bills of exchange, but they are of a totally different origin. They cannot be said to be made *secundum usum mercatorum* since they find their recognition and validity in the more ancient rules of the common law. On the other hand, bills of exchange find their origin and sanction in the usage and custom of merchants, the *lex mercatoria*, a particular or peculiar system, which, being in the interest of commerce, became at length gradually engrafted into, and established as a part of the common law itself. * * * All contracts under seal are specialties, sealing and delivery being the particular form and ceremony which alter the nature and operation of the agreement. Forms consecrated by time and usage, become substance. The seal is substance and changes the nature and operation of the contract. It seems to me, therefore, that the question which I have been considering is settled upon principle against the plaintiffs. But, however this may be, it has been held as settled for more than thirty years past." Gilpin, Ch. J., in Conine *v.* Junction & B. R. Co., 3 Houst. 289.

[2] Clark *v.* Farmers' Manuf'g Co., 15 Wend. 256.

[3] Central Nat. Bk. *v.* Charlotteville, etc., R. Co., 5 S. C. 156; Rand *v.* Dovey, 83 Pa. St. 280. In the last case, the instrument was indorsed under seal of the corporation.

The rule has, also, of late years, been modified by the courts holding, that in order that the affixing of a seal to what would otherwise be a negotiable bill or note may make the paper a specialty contract and destroy its negotiability, there must be some attestation or recognition of the use of a seal in the body of the instrument; as, for example, by the insertion of some such words as "witness my hand and seal" or "signed and sealed." This limitation of the rule is advocated as a guard against the practice of fraud by the unauthorized addition of a seal.[1] In some of the States, the rule has by statute been altogether repealed, and in those States sealed instruments are negotiable, if they possess all the other requisites of commercial paper.[2]

§ 33. **Attestation of witnesses.** — It is not at all necessary to the validity of commercial paper that the signature of the maker be attested by a subscribing witness. But, sometimes, particularly when the signature is made by a mark or by the initials, it is advisable to have attesting witnesses. When there is such a witness, the execution of the paper can only be proved by his testimony, unless he cannot be produced at the trial, on account of his death, absence from the country, or other inability to appear.[3] If the witness cannot be produced, the execution may and

[1] Peasley *v.* Boatwright, 2 Leigh, 196; Cromwall *v.* Tate's Exrs. 7 Leigh 305; Austin *v.* Whitlock, 1 Munf. 487; Anderson *v.* Bullock, 4 Munf. 442; Baird *v.* Blagrove, 1 Wash. 170; Argenbright *v.* Campbell, 3 H. M. 174; Skrine *v.* Lewis, Ga. (1882).

[2] Such statutes are to be found in Colorado, Dakota, Florida, Georgia, Illinois, Kansas, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and probably in other States. 1 Daniel Negot. Inst., § 33.

[3] Greenleaf on Evidence, §§ 569, 572; 2 Parsons on N. & B. 474; Stone *v.* Metcalf, 1 Stark. 53; Lemon *v.* Deane, 2 Camp. 636; Richards *v.* Frankum, 9 C. & P. 211; Burt *v.* Walker, 4 B. & Ald. 697; January *v.* Goodman, 1 Dall. 208; Wood *v.* Doury, 1 Ld. Raym. 734; Nelson *v.* Whittall, 1 B. & Ald. 22, note.

should be proved by proof of his (the witness') signature.[1] And if he cannot prove his own signature, when he appears, it may also be proved by secondary evidence.[2]

In England, by statute, proof by the attesting witness is dispensed with, and may be furnished by any other testimony; [3] and in this country, the rule is now so far relaxed, that proof by the witness is not necessary, where there is an unequivocal admission of his signature by the maker or other party defendant.[4]

§ 34. **Delivery.** — Until the bill or note has been delivered to the payee, it can have no validity. Intentional delivery is also essential. For, while the possession of a commercial paper by the payee or some one else, other than the maker or acceptor, to whom on its face it appears to be payable, is *prima facie* evidence of a good title, yet it is not conclusive;[5] and if it be shown that there has been no delivery to the payee, it is valueless even in the hands of an innocent purchaser. As long as a bill or note has not been delivered, it is a nullity.[6] Delivery is so essential a part of the execution of a bill or note, that it is not necessary to aver that it has been delivered, since the averment

[1] Greenleaf on Evidence, § 575; Page *v.* Newman, M. & M. 79; Dunbar *v.* Marden, 13 N. H. 311; Shiver *v.* Johnson, 2 Brev. 397; Bussey *v.* Whittaker, 2 Nott & McC. 374; Lyons *v.* Holmes, 11 S. C. 429.

[2] Lemon *v.* Deane, 2 Camp. 636; Quimby *v.* Buzzell, 16 Me. 470; Walker *v.* Warfield, 6 Met. 466; Shiver *v.* Johnson, 2 Brev. 397.

[3] 1 Daniel's Negot. Inst., § 112.

[4] Hodges *v.* Eastman, 12 Vt. 358; Shaver *v.* Ehle, 16 Johns. 201; Hall *v.* Phelps, 16 Johns. 451; Henry *v.* Bishop, 2 Wend. 575; Williams *v.* Floyd, 11 Pa. St. 499.

[5] Woodford *v.* Dorwin, 3 Vt. 82; Griswold *v.* Davis, 31 Vt. 390.

[6] Roberts *v.* Bethell, 12 C. B. 778; Cox *v.* Troy, 5 B. & Ald. 474; Bailey *v.* Taber, 5 Mass. 286; Woodford *v.* Dorwin, 3 Vt. 82; Lansing *v.* Caine, 2 Johns. 300; Marvin *v.* McCullom, 20 Johns. 288; Devries *v.* Shumate, 53 Md. 216; Ward *v.* Churn, 18 Gratt. 801; Howe *v.* Ould; Bartlett *v.* Ould, 28 Gratt. 7; Hopper *v.* Eiland, 21 Ala. 714; Richards *v.* Darst, 51 Ill. 141; Freeman *v.* Ellison, 37 Mich. 459.

of the making of a note or bill necessarily includes the idea of delivery.[1]

A bill or note, found among the papers of the drawer or maker at his death, cannot be sued on by the payee;[2] nor can the personal representative make an effectual delivery of it,[3] even though the deceased has left instructions for its delivery, unless those instructions could operate as a will and testament.[4] If the paper is given to an agent to be by him delivered to the payee, as long as the agent has not in fact delivered it to the payee, it is subject to the recall of the maker; and he can compel its return to him.[5] Delivery may be either actual or constructive. A direction to the custodian of a negotiable instrument to hold it to the payee's order, or to deliver it to him or the indorsee, is equivalent to an actual delivery.[6] And even where, in indorsing a note, the indorser, who sustains the character of banker of the indorsee, instead of making an actual delivery to him, puts it into an envelope containing other papers of the indorsee, this is held to be a good constructive delivery.[7]

§ 34a. **Delivery to whom.** — Ordinarily, the delivery must be made to the payee. But this is not always neces-

[1] Churchill *v.* Gardner, 7 T. R. 596; Smith *v.* McClure, 5 East, 477; Binney *v.* Plumley, 5 Vt. 500; Peets *v.* Bratt, 6 Barb. 662; Black *v.* Duncan, 60 Ind. 522; Chester, etc., R. R. Co. *v.* Lickiss, 72 Ill. 521.

[2] Disher *v.* Disher, 1 P. Wms. 204.

[3] Bromage *v.* Lloyd, 1 Exch. 32; Clark *v.* Sigourney, 17 Conn. 511; Clark *v.* Boyd, 2 Ohio, 56. But it has been held that where the payee has made advances in expectation of the delivery of the paper, he or his indorsee would be entitled to a delivery, notwithstanding the maker's death. Perry *v.* Crammond, 1 Wash. C. C. 100; 1 Parson's N. & B. 49.

[4] Gough *v.* Findon, 7 Exch. 48.

[5] King *v.* Lambton, 5 Price, 428; Devries *v.* Shumate, 53 Md. 216; 1 Parson's N. & B. 48–50.

[6] Fisher *v.* Bradford, 7 Greenl. 28; Richardson *v.* Lincoln, 5 Metc. 201; Howe *v.* Ould, 28 Gratt. 7; Mitchell *v.* Byrne, 6 Rich. 171.

[7] Williams *v.* Galt, 65 Ill. 172.

sary. It may be delivered to a third person for the benefit of the payee.[1] But the assent of the payee is necessary in order to make the transaction complete. Where, however, a note or bill is delivered to a father, for the benefit of a minor, or to a trustee, for the benefit of a *cestui que trust*, the assent of the payee is presumed from the confidential relation existing between him and the person to whom the delivery is made.[2]

The instrument cannot be left upon the desk or counter of the payee's place of business, and be legally delivered, unless it is left there with the knowledge and assent, either of the payee, or of one who is authorized to act for him in such a case.[3] But a mere objection to the form of the instrument will not invalidate the delivery, if the instrument is retained by the payee.[4]

It is also quite customary to make delivery of commercial paper through the mail. And if this is done, with the express or implied assent of the payee, it constitutes a good delivery, binding all parties to the contract, even though the paper should be lost in the mail.[5] Where the paper is delivered through the mail or express, as long as it is *in transitu*, the maker or indorser may exercise the right of stoppage *in transitu* in the same manner and under the same limitations as the vendor of any other kind of personal property.[6]

§ 34*b*. **Time of delivery.** — The commercial paper takes effect only from the time of delivery, and where there is

[1] Elliott *v.* Deason, 64 Ga. 63.

[2] Mason *v.* Hyde, 41 Vt. 432; Tucker *v.* Bradley, 33 Vt. 325.

[3] Chicopee Bank *v.* Phila. Bank, 8 Wall. 641; Kinney *v.* Ford, 52 Barb. 194.

[4] Bodley *v.* Higgins, 73 Ill. 375.

[5] Rex *v.* Lambton, 5 Price, 428; Kirkman *v.* Bank of America, 2 Cold. 397.

[6] Muller *v.* Pondir, 55 N. Y. 325.

a date given in the paper, the delivery is presumed to have been made on that date;[1] and in every case it is presumed to have been made before the day of maturity.[2] But this presumption may be rebutted; and it may be shown by parol evidence that the paper had been delivered on some other day.[3] But the difference between the date of the instrument and the time of its actual delivery will not be allowed to vary the time of maturity, where it is made payable at a certain time after date. The time will be computed from the day stated in the instrument, although it had not been delivered until a later day.[4] It is also proper to describe the paper in the pleadings as having been drawn on the given date, instead of the actual day of delivery.[5]

§ 34c. **Delivery on Sunday.** — The common law contains no prohibition of labor on Sundays; but in very many, in fact most, of the States, there are statutes in force, which prohibit the prosecution of all ordinary pursuits, and invalidate all contracts and business transactions. Under these statutes, no suits can be maintained on bills of exchange and promissory notes, which are executed or indorsed on Sunday.[6] But a bill or note is not fully executed until

[1] Sinclair *v.* Baggaley, 4 M. & W. 312; Anderson *v.* Weston, 6 Bing. (N. C.) 296; Cranston *v.* Goss, 107 Mass. 439.

[2] Churchill *v.* Gardiner, 7 T. R. 596; Smith *v.* McClure, 5 East, 477.

[3] Woodford *v.* Dorwin, 3 Vt. 82; Lovejoy *v.* Whipple, 18 Vt. 379.

[4] Snaith *v.* Mingay, 1 M. & S. 87; Barker *v.* Sterne, 9 Exch. 684; Powell *v.* Waters, 8 Cow. 669; Bumpass *v.* Timms, 3 Sneed, 459.

[5] Snaith *v.* Mingay, 1 M. & S. 89. See Hague *v.* French, 3 Bos. & Pul. 173; Giles *v.* Bourne, 6 M. & S. 73.

[6] Bk. of Cumberland *v.* Mayberry, 48 Me. 198; Pope *v.* Linn, 50 Me. 86; Benson *v.* Drake, 55 Me. 555; Smith *v.* Bean, 15 N. H. 577; State Capital Bk. *v.* Thompson, 42 N. H. 370; Ball *v.* Powers, 62 Ga. 757; Bramhall *v.* Van Camper, 8 Minn. 13; Pinney *v.* Callendar, 8 Minn. 42; Smith *v.* Case, 2 Ore. 190. Concerning the constitutionality of Sunday laws, see Tiedeman's Limitations of Police Power, § 71.

it has been delivered; and if it should be signed on Sunday, but not delivered until Monday, or on some other secular day, it will be valid. It does not become a Sunday contract, because the paper was dated and written out on Sunday; and although it is presumed that a bill or note is delivered on the day of the date, parol evidence is admissible to show that it has been delivered on some other day.[1] Nor does it affect the validity of such a note or bill, that interest is to be computed from the Sunday, when it was dated and signed.[2] And it seems to be also well settled that even though a piece of commercial paper is delivered on Sunday, it may be legalized by a subsequent ratification or a redelivery of the paper.[3] In any event, the illegal delivery on Sunday will not prevent a recovery of the consideration, for which the paper was given.[4]

It is not necessary for the defendant to prove affirmatively that the paper was dated and delivered on Sunday. The court will take judicial notice of the fact that the date of the paper is a Sunday,[5] and all parties to the contract are charged with notice of that fact. Where, however, the paper is delivered on Sunday, but bears a different date, the paper is only void as to those parties who take it with knowledge of the illegality. An indorsee for value, and without notice of its delivery

[1] Drake *v.* Rogers, 32 Me. 524; Lovejoy *v.* Whipple, 18 Vt. 379; State Capitol Bk. *v.* Thompson, 42 N. H. 376; Dohoney *v.* Dohoney, 7 Bush, 217; Aldridge *v.* Branch Bk., 17 Ala. 45; Flanagan *v.* Meyer, 41 Ala. 133; Trieber *v.* Commercial Bank, 31 Ark. 128; Fritsch *v.* Heesless, 40 Mo. 556; King *v.* Fleming, 72 Ill. 21; Vinton *v.* Peck, 15 Mich. 287. In Indiana it is held that where a note is delivered on Sunday to the comaker for the payee, it will be void. Davis *v.* Barger, 57 Ind. 55.

[2] Marshall *v.* Russell, 44 N. H. 509.

[3] Hilton *v.* Houghton, 35 Me. 143; Winchell *v.* Carey, 115 Mass. 560; Clough *v.* Davis, 9 N. H. 500; Lovejoy *v.* Whipple, 18 Vt. 379; Commonwealth *v.* Kendig, 2 Pa. St. 448; King *v.* Fleming, 72 Ill. 21.

[4] Sayre *v.* Wheeler, 31 Iowa, 112; 1 Ames on N. & B. 352.

[5] Finney *v.* Callendar, 8 Minn. 41.

on Sunday, will take a negotiable paper free from the defense of illegality.[1]

§ 34*d*. **Delivery as an escrow.**—It is generally held that a negotiable bill or note, like a deed of conveyance or bond, may also be delivered as an escrow. An escrow is usually defined as a legal instrument, delivered to a third person to be held by him until the happening of a certain condition or conditions, when the title is to pass to the person for whom it is intended.[2] In order that a deed may be an escrow, it must be delivered to a stranger to hold until the condition is performed, then to be delivered to the grantee. If the delivery is made to the grantee, it will be an absolute delivery, whatever conditions may be annexed thereto, and the title will immediately pass to the grantee.[3] And this is generally accepted as the rule in respect to the delivery of commercial paper as an escrow, except that it seems not to be necessary in this case to make a second delivery to the payee or indorsee.[4] But it has been held in New York that the commercial paper may be

[1] Pope *v.* Linn, 50 Me. 84; State Capital Bk. *v.* Thompson, 42 N. H. 370; Cranson *v.* Goss, 107 Mass. 439; Greathead *v.* Walton, 40 Conn. 81; Nelson *v.* Cowing, 20 Wend. 336; Ball *v.* Powers, 62 Ga. 757; Trieber *v.* Commercial Bank, 31 Ark. 128; Clinton Nat. Bk. *v.* Graves, 48 Iowa, 228; Knox *v.* Clifford, 38 Wis. 651. But see, *contra*, Gilbert *v.* Vauchon, 69 Ind. 372; Parker *v.* Pitts, 73 Ind. 598.

[2] Tiedeman on Real Property, § 815.

[3] Fairbanks *v.* Metcalf, 8 Mass. 230; Ward *v.* Lewis, 4 Pick. 520; Gilbert *v.* N. A. F. Ins. Co., 23 Wend. 43; Worsall *v.* Munn, 6 N. Y. 229; Black *v.* Shreve, 13 N. J. 458; Moss *v.* Riddle, 5 Cranch, 351; Cin., W. & Z. R. R Co., 13 Ohio St. 249; M. & Ind. Plank Road Co. *v.* Stevens, 15 Ind. 1; State *v.* Chrisman, 2 Ind. 126; Foley *v.* Cowgill, 5 Blackf. 18; Blake *v.* Fash, 44 Ill. 305; Jane *v.* Gregory, 42 Ill. 416; Fireman's Ins. Co. *v.* McMillan, 29 Ala. 160. See Tiedeman on Real Prop., § 815.

[4] Babcock *v.* Steadman, 1 Root, 87; Couch *v.* Meeker, 2 Conn. 302; Jones *v.* Shaw, 67 Mo. 667; Massman *v.* Holcher, 49 Mo. 87; Scott *v.* State Bank, 9 Ark. 36; Taylor *v.* Thomas 13 Kan. 217; 1 Parsons' N. & B. 51; 1 Daniel's Negot. Inst., § 68.

delivered to the payee, and yet operate as an escrow. In announcing the opinion of the court, Folger, J., said: "Instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which the delivery is made." [1] This apparent contradiction of authorities may be explained away by the statement that there cannot, on account of the peculiar character of negotiable paper, be any true delivery of it as an escrow. The principal characteristic of an escrow deed is that no title can pass to the grantee, — not even in favor of innocent purchasers for value of the grantee, — by any delivery to him, except upon the performance of the condition;[2] whereas, a deed, like any other legal instrument, if delivered to the grantee subject to certain conditions will be an absolute delivery, except as between the original parties, and subsequent purchasers with notice or without consideration.[3] But this distinction between a conditional delivery to the payee and a delivery as an escrow to

[1] Benton *v.* Martin, 52 N. Y. 574.

[2] Fairbanks *v.* Metcalf, 8 Mass. 230; Souverbye *v.* Arden, 1 Johns. Ch. 240; Hinman *v.* Booth, 21 Wend. 267; People *v.* Bostwick, 32 N. Y. 450; Stiles *v.* Brown, 16 Vt. 563; Smith *v.* So. Royalton Bk., 32 Vt. 341; Black *v.* Shreve, 13 N. J. 458; Jackson *v.* Sheldon, 22 Me. 569; Blight *v.* Schenck, 10 Pa. St. 285; Berry *v.* Anderson, 22 Ind. 40; Illinois Cent. R. R. Co. *v.* McCullagh, 59 Ill. 170; Chipman *v.* Tucker, 38 Wis. 43 (20 Am. Rep. 1). See *contra*, Rhodes *v.* Gardiner, 30 Me. 110.

[3] Ward *v.* Lewis, 4 Pick. 518; Simonton's Est., 4 Watts, 180; Currie *v.* Donald, 2 Wash. (Va.) 59; Miller *v.* Fletcher, 27 Gratt. 403; Duncan *v.* Pope, 47 Ga. 445.

a third person, is not recognized by many of the cases in the law of commercial paper. In both instances the innocent purchaser for value gets a good title, whether the conditions have been performed or not.[1]

§ 35. **Bills and notes executed in blank.** — It is more or less common for bills of exchange and promissory notes to be executed in blank, and delivered to another to fill up and negotiate, for the benefit of the maker, or for his own benefit. There is no need for any second delivery by the maker after the completion of the instrument.[2] As it was stated by the Supreme Court of the United States, "where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was intrusted must be deemed the agent of the party who committed such instrument to his custody, — or in other words, it is the act of the principal and he is bound by it."[3]

[1] 1 Parsons' N. & B. 51; Babcock *v.* Steadman, 1 Root, 87; Massman *v.* Holcher, 49 Mo. 87; Jones *v.* Shaw, 67 Mo. 667; Scott *v.* State Bk., 9 Ark. 36. See *contra*, Chipman *v.* Tucker, 38 Wis. 43; Roberts *v.* McGrath, 38 Wis. 52; Roberts *v.* Wood, 38 Wis. 60. See *post*, § 286.

[2] Usher *v.* Dauncey, 4 Camp. 97; Powell *v.* Duff, 3 Camp. 182; Bulkley *v.* Butler, 2 B. & C. 425; Androscoggin Bk. *v.* Kimball, 10 Cush. 373; Ives *v.* Farmers' Bk., 2 Allen 236; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Hardy *v.* Norton, 66 Barb. 527; Mahone *v.* Central Bank, 17 Ga. 111; Waldron *v.* Young, 9 Heisk. 777; Nichol *v.* Bate, 10 Yerg. 429; Commonwealth *v.* Curry, 2 Dana, 142; Bk. of Limestone *v.* Perrick, 5 T. B. Mon. 25; Fullerton *v.* Sturgiss, 4 Ohio St. 529; Rich *v.* Starback, 51 Ind. 87; Coburn *v.* Webb, 56 Ind. 96; Snyder *v.* Van Doren, 46 Wis. 602; Joseph *v.* Nat. Bk., 17 Kan. 259; Davidson *v.* Lamier, 4 Wall. 457; Angle *v.* N. W., etc., Ins. Co., 92 U. S. 330.

[3] Bank of Pittsburg *v.* Neal, 22 How. (U. S.) 107.

But the rule is different in regard to sealed instruments. Since it requires a power of attorney under seal for an agent to execute and deliver a bond or deed, a mere parol authority to him to fill up the blanks in the bond or deed and to deliver it to the person for whom it was intended, will not pass title to such person. The agent must either have an authority under seal, or the perfected instrument must be delivered by the maker himself.[1] Many of the American courts, following the overruled English case of Texira *v.* Evans,[2] hold that an agent may on a parol authority execute and deliver a bond or deed, that has been handed to him in blank.[3] But whatever may be the correct rule in respect to sealed instruments generally, it is well settled that "coupon" bonds and other bonds, which are now included under the heading of commercial paper or negotiable instruments, may, like bills and notes, on a parol authority, be delivered in blank to an agent to be filled up and delivered to the proper person by him.[4]

[1] Hibblewhite *v.* McMowrie, 6 Mees. & W. 200; Enthorer *v.* Hoyle, 9 Eng. L. & Eq. 434; Pruston *v.* Hull, 23 Gratt. 602; Penn *v.* Hamlet, 27 Gratt. 337; Davenport *v.* Sleight, 2 Dev. & Bat. L. 381; Bland *v.* O'Hagan, 64 N. C. 471; Burden *v.* Sutherland, 70 N. C. 528; Burns *v.* Lynde, 6 Allen, 305; Basford *v.* Pearson, 9 Allen, 388; Vose *v.* Dolan, 108 Mass. 159; Chauncey *v.* Arnold, 24 N. Y. 330; Ingram *v.* Little, 14 Ga. 174; Gilbert *v.* Anthony, 1 Yerg. 69; Williams *v.* Crutcher, 6 Miss. 71; Viser *v.* Rice, 33 Tex. 130; Cross *v.* State Bank, 5 Ark. 525; Cummings *v.* Cassity, 5 B. Mon. 74; Conover *v.* Porter, 14 Ohio, 450; Simms *v.* Harvey, 19 Iowa, 290; People *v.* Organ, 27 Ill. 29; Mans. *v.* Worthing, 3 Ill. 26; Upton *v.* Archer, 41 Cal. 85.

[2] 1 Anstr. 228.

[3] Inhabitants, etc., *v.* Huntress, 53 Me. 90; McDonald *v.* Eggleston, 26 Vt. 161; Woolley *v.* Constant, 4 Johns. 60; Ex parte Decker, 6 Cow. 60: Ex parte Kerwin, 8 Cow. 118; Wiley *v.* Moor, 17 Serg. & R. 438; Duncan *v.* Hodjes, 4 McCord, 239; Gouslin *v.* Commander, etc., 6 Rich. 497; Field *v.* Stagg, 52 Mo. 534; Van Etta *v.* Evanson, 28 Wis. 33; Devin *v.* Himer, 29 Iowa, 301; Owen *v.* Perry, 25 Iowa, 412.

[4] White *v.* Vermont, etc., R. R. Co., 21 How. 575; Preston *v.* Hall, 23 Grat. 613. See *post*, chapter on Coupon and Municipal Bonds.

CHAPTER III.

AGREEMENTS CONTROLLING THE OPERATION OF BILLS AND NOTES.

SECTION 40. Kinds of agreements.
41. Memoranda.
41*a*. Effect of memoranda.
42. Collateral agreements.
43. Agreements to renew.

§ 40. **Kinds of agreements.**— Agreements, which are intended to control the operation of bills and notes, are of two principal kinds, viz: memoranda on the face or back of the instruments, and collateral or independent agreements. The principal legal difference between the two kinds lies in the fact, that the memorandum when inscribed on the paper itself will furnish actual or constructive notice of itself to all subsequent holders, and hence will control the operation or character of the bill or note, into whosoever hands it may come.[1] Whereas collateral agreements can only control the operation of the instrument as to those parties to it, who have received actual notice of their existence. There can be no constructive notice of such an agreement, for nothing of it appears in the body of the negotiable instrument.

§ 41. **Memoranda.** — It is not every memorandum which will be held to be a part of the negotiable instrument; only those which by their terms are evidently designed to, and actually do, affect the character, and control the operation

[1] Perry *v.* Bigelow, 128 Mass. 129; Gift *v.* Hall, 1 Humph. 480; Hatfield *v.* Griffith, 1 Lee (Tenn.), 301; 2 Parsons' N. & B. 539.

of the instrument. If the memorandum is of such content that it could only have been intended as an aid to the memory of the holder or maker, to identify the instrument itself or its source and consideration; or where the memorandum is a direction to the holder's own agents or personal representatives what to do with the paper, it will not be allowed to become a part of the instrument and cannot therefore change or alter its character.[1] Nor can the memorandum be treated as a part of the instrument, where it is so ambiguous and repugnant to the other contents of the instrument that parol evidence is necessary to explain its import, for parol evidence is never admissible to alter or vary the terms of a written contract.[2] But with these limitations, any memorandum, written in any part of the bill or note, on its face, will constitute a part of the instrument, and control its operation.[3]

In all, or almost all, of these cases, the memoranda were written on the margins of the face of the paper. But such

[1] Stone *v.* Metcalf, 4 Camp. 217; Brill *v.* Crick, 1 M. & W. 232; Fitch *v.* Jones, 5 El. & B. (85 E. C. L. R.) 238; Odiorne *v.* Sargent, 6 N. H. 401; Benedict *v.* Cowden, 49 N. Y. 402.

[2] Heywood *v.* Perrin, 10 Pick. 228; Way *v.* Batchelder, 129 Mass. 361; Krouskop *v.* Shoutz, 51 Wis. 204.

[3] Warrington *v.* Early, 2 El. & Bl. (75 E. C. L. R.) 763, memorandum in corner "with lawful interest;" "one-half payable in twelve months, the balance in twenty-four months." Heywood *v.* Perrin, 10 Pick. 228; payable in "foreign bills," Jones *v.* Fales, 4 Mass. 254; payment not to be forced before a certain time, Franklyn Sav. Inst. *v.* Reed, 125 Mass. 365; Springfield Bank *v.* Merrick, 14 Mass. 322; Costello *v.* Crowell, 127 Mass. 293 ("given as collateral security with agreement"); Johnson *v.* Heagan, 23 Me. 329; Henry *v.* Colman, 5 Vt. 403; "payable in fulled cloth one year from the month of October next," Fletcher *v.* Blodgett, 16 Vt. 26; Benedict *v.* Cowden, 49 N. Y. 402; Dewey *v.* Reed, 40 Barb. 21; "if the machine should not be delivered this note not to be paid," Wait *v.* Pomeroy, 20 Mich. 425; State *v.* Stratton, 27 Iowa, 424. "Ints. at 12½ per cent," Hatfield *v.* Griffith, 1 Lea (Tenn.), 300. "Brandon money," Gift *v.* Hall, 1 Humph. 480; payable only on the happening of a certain event, Effinger *v.* Richards, 35 Miss. 540.

memorandum, nevertheless, "forms part of the contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded." [1] But the memoranda, which are intended to control the character and operation of the instrument, need not be on its face. Although there are some early cases in New York to the contrary,[2] the weight of authority in this country, as well as in England, is in favor of recognizing, as part of the instrument and as controlling its operation, every memorandum which can affect its character, whether it is written on the face or on the back of the paper. No difference is recognized in their legal effect. It has been very generally held, that memoranda on the back of the instrument constitute a part of it, that "the purport of the instrument is not only to be collected from 'the four corners,' but from 'the eight corners.'" [3]

[1] Lord Campbell, C. J., in Warrington *v.* Early, 2 El. & Bl. (75 E. C. L. R.) 763.

[2] Sanders *v.* Bacon, 8 Johns. 485; Tappan *v.* Ely, 15 Wend. 363. The later cases place New York in a line with the other courts. See next note.

[3] 1 Daniel's Negot. Inst., § 151; note made payable, by memorandum on back, whenever maker is able, Barnard *v.* Cushing, 4 Metc. 231; "the within note is given for securing certain floating advances," Cholmeley *v.* Darley, 14 M. & W. 344; condition providing for certain deductions on a certain contingency, Henry *v.* Colman, 5 Vt. 402; payment not to be demanded until a certain mill was sold, Blake *v.* Coleman, 22 Wis. 416; "payable in wheat at ninety-five cents a bushel," Polo. Manfg. Co. *v.* Parr, 8 Neb. 379; "payable at the Bank of America," Woodworth *v.* Bank of America, 19 Johns. 391; "the above note to be paid from the profits of machines when sold," Benedict *v.* Cowden, 49 N. Y. 396; "interest to be paid semi-annually," Dewey *v.* Reed, 40 Barb. 17; Farmers' Bk. *v.* Ewing, 78 Ky. 266; Leeds *v.* Lancashire, 2 Camp. 205; Hartley *v.* Wilkinson, 4 Camp. 127.

§ 41*a*. **Effect of memoranda.** — If the memorandum is made contemporaneously with the execution of the instrument, it clearly becomes a constituent of it; and in construing the legal effect of the instrument, and determining its character, the memorandum must be considered in connection with the rest of the writing. It is always presumed, in the absence of evidence to the contrary, that the memoranda were made at the time that the paper was executed, or before delivery.[1] There may be some doubt, whether memoranda on the back may be presumed to have been made before delivery, and Prof. Parsons says "it has been held that words written on the back of a note are no part of the body thereof, *prima facie*, but are presumed to be done after the note is completed.[2]" In Mississippi, it has been held that all memoranda, whether on the face or on the back, should be presumed to have been made after the note had been executed. "If such memoranda are at the foot or on the back of the note or other instrument when executed, they constitute a part of the contract. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed." [3]

It is clear that such a memorandum was added after the instrument had been written out, but there is nothing on the face of the paper to indicate whether it was added before or after delivery; and since its legality would be more certain, if it were added before delivery, it is but reasonable for the courts to presume that it was added at that time. When, and under what circumstances the memoranda were made, are questions of fact for the jury.[4] But if the memoran-

[1] Tuckerman *v.* Hartwell, 3 Greenl. 147; Jones *v.* Fales, 4 Mass. 253; Henry *v.* Colman, 5 Vt. 402; Fletcher *v.* Blodgett, 16 Vt. 26; Leeds *v.* Lancashire, 5 Maul. & Sel. 25; Harvey *v.* Effinger, 35 Miss. 552.

[2] 2 Parsons' N. & B. 544.

[3] Simrall, J., in Buy *v.* Sprader, 50 Miss. 330.

[4] Makepeace *v.* Harvard College, 10 Pick. 303.

dum is added to the paper, after it has been negotiated, the effect of it will depend upon the circumstances. If it is made with the consent of all parties, it controls the operation of the instrument in the same manner as if it had been added before delivery; if it was added by a stranger, it will be treated as surplusage, and have no effect upon the character of the instrument. But if the memorandum is made by the holder, and without the consent of the other parties, it is an alteration, which if material will avoid the instrument.[1]

§ 42. **Collateral agreements,** — may be either contemporaneous or subsequent. If it is contemporaneous, the agreement must be in writing; for otherwise the rule of evidence would be violated, which prohibits the admission of parol evidence to vary or control the terms of a written instrument,[2] unless the parol evidence is intended to show that by accident, fraud or mistake, the agreement was unintentionally omitted from the body of the instrument.[3] The contemporaneous agreement must be construed as a part of the instrument, at least as between the original parties and all others who take the negotiable instrument with notice of the agreement.[4] Subsequent agreements, whose terms change those of the commercial paper, already

[1] See *post*, chapter on Forgeries and Alterations, for a full discussion of the subject of alterations.

[2] Hoare *v.* Graham, 3 Camp. 57; Gibbon *v.* Scott, 2 Stark. 286; Abbott *v.* Hendricks, 1 M. & G. (39 E. C. L. R.) 795; Grafton Bank *v.* Woodward, 5 N. H. 99; Hill *v.* Gaw, 4 Barr, 493; Fleming *v.* Gilbert, 3 Johns. 520.

[3] Miller *v.* Henderson, 10 Serg. & R. 290; Renshaw *v.* Gaus, 7 Barr, 117.

[4] In Muzzy *v.* Knight, 8 Kan. 456, an agreement in a mortgage, that interest should be paid annually, was held to control the effects of the note, to secure which the mortgage was given. See also Meyer *v.* Graeber, 19 Kan. 165; Dobbins *v.* Parker, 46 Iowa, 358; Cuthbert *v.* Bowie, 10 Ala. 163.

delivered, partake of the nature of novations; and if they are based upon a sufficient consideration, they will control the operation of the paper, although they may be oral agreements.[1] Where the subsequent agreement operates as a substitute contract for the note or other instrument, its performance will operate as a complete discharge of the note.[2] But as long as the agreement remains executory, it can have no effect upon the note; and it has been held that a failure to carry out the agreement furnishes only an independent action for damages, and cannot serve as a defense to the action on the note.[3] But this rule is no doubt dependent now upon the provisions of the local laws of pleading, and the breach of such an agreement will now be a good defense to the action on the note, at least, in the code States, as a counter-claim.

§ 43. **Agreements to renew.** — The most frequent collateral agreement in practice is the agreement to renew the note or bill. It may be either contemporaneous or subsequent. If contemporaneous, it must be in writing, and if subsequent, it must be supported by an independent consideration. In such cases the agreement would be binding upon the payee and any holder, who took the paper with notice of the agreement.[4] But, unless it expressed the number of times that the paper may be renewed, it will be presumed that only one renewal was intended.[5]

[1] Low *v.* Treadwell, 12 Me. 441; Dow *v.* Tuttle, 4 Mass. 414; Allen *v.* Furbish, 4 Gray, 504; Solomons *v.* Jones, 3 Brev. 54; Heaton *v.* Myers, 4 Col. 63; Newton *v.* Jackson, 23 Ala. 335.

[2] Crossman *v.* Fuller, 17 Pick. 171.

[3] Dow *v.* Tuttle, 4 Mass. 414; Kelso *v.* Frye, 4 Bibb, 493. *Contra*, Grafton Bank *v.* Woodward, 5 N. H. 99; Erwin *v.* Saunders, 1 Cow. 249.

[4] Innes *v.* Munro, 1 Exch. 473; Bowerbank *v.* Monteiro, 4 Taunt. 844; McManus *v.* Bark, 5 L. R. Ex. 65.

[5] Innes *v.* Munro, 1 Exch. 473.

CHAPTER IV.

PERSONS INCAPACITATED TO BECOME PARTIES TO COMMERCIAL PAPER.

SECTION 46. Disability of infants — Liability for necessaries.
47. Infant's contracts, voidable, not void.
48. An infant's notes and bills.
49. Infant as payee and indorser.
50. Ratification of infant's bills and notes.
51. Joint note or bill of infant and adult.
52. Lunatics and imbeciles.
53. Effect of insanity, when unknown to other party.
54. Lunatic's contracts for necessaries.
55. Ratification of lunatic's contracts.
56. Lunatic as payee and indorser.
57. The contracts of drunken persons.
58. The disability of all persons under guardianship — Spendthrifts.
59. Disability of coverture — Commercial paper of married women.
60. Effect of marriage on ante-nuptial notes and bills.
61. Exceptions to married woman's contractual disability.
62. Commercial paper of married women with separate estate.
63. Married woman as payee and indorser.
64. Reduction of wife's choses in action to possession.
65. The bankrupt or insolvent payee.
66. Alien enemies as parties to commercial paper.

§ 46. **Disability of Infants — Liability for necessaries.** — Persons under a certain age are called minors or infants, and because of their immaturity of mind the law takes away from them the power to make contracts, except for necessaries. The age of majority in all of the United States for males, and in most of the States for females, is twenty-one years, and this was the common-law rule in England. But in some of the States, the majority

of females is placed by statute at eighteen.[1] An infant's contract for necessaries is binding upon him, so far that he may be compelled to pay for their value; but he is not bound for the contract price. His liability for necessaries is rather imposed by the law, than by his contract.[2] To the question, what are necessaries, it may be replied, that whatever in reason the infant needs for his maintenance, shelter, education and comfort, regard being had to his means and social standing, would be held by the law to be necessaries.[3] And where the infant's means are considerable, articles which are useful, but which are ordinarily considered to be luxuries, unnecessary to the comfort of a child, such as a watch, a horse, or a valet, etc., may, nevertheless, in special cases be treated as necessaries, for which the infant will be liable on a *quantum meruit*.[4]

But money, whether or pleasure for business enterprises, is never a necessary, and therefore one who lends money to an infant cannot recover it as a necessary, even though the

[1] 1 Parsons' Contracts, 294; Bishop on Contracts, § 893; Cogel *v.* Raph, 24 Minn. 194. See Dent *v.* Cock, 65 Ga. 400.

[2] Hyer *v.* Hyatt, 3 Cranch C. C. 276; Robinson *v.* Weeks, 56 Me. 102; Stone *v.* Dennison, 13 Pick. 1; Earle *v.* Reed, 10 Met. 387; Gay *v.* Ballou, 4 Wend. 493; Commonwealth *v.* Hantz, 2 Pa. 333; Hyman *v.* Cain, 3 Jones (N. C.), 111; Bonchell *v.* Clary, 3 Brev. 194; Morton *v.* Steward, 5 Bradw. 533.

[3] Burghart *v.* Angerstein, 6 C. & P. 690; Peters *v.* Fleming, 6 M. & W. 42; Ryder *v.* Wombwell, L. R. 4 Ex. 32; Angel *v.* McLellan, 16 Mass. 28; Hoyt *v.* Casey, 114 Mass. 397; Strong *v.* Foote, 42 Conn. 203; Wailing *v.* Toll, 9 Johns. 141; Gay *v.* Ballou, 4 Wend. 403; Werner's Appeal, 10 Norris (Pa.), 222; Anderson *v.* Smith, 33 Md. 465.

[4] "From the earliest time down to the present, the word 'necessaries' was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is." Parke, B., in Pertes *v.* Fleming, 6 M. & W. 46; Berolles *v.* Ramsay, Holt N. P. 77; Hart *v.* Prater, 1 Jur. 623; Hands *v.* Slaney, 8 T. R. 578; Brooker *v.* Scott, 11 M. & W. 67; Merriam *v.* Cunningham, 11 Cush. 40; Davis *v.* Caldwell, 12 Cush. 512.

money be afterwards spent for necessaries.[1] So, also, will goods, furnished to an infant to carry on some mercantile or other business, not be considered necessaries, whose value can be recovered of the infant.[2] But where the infant is in charge of his property, under the law, it is generally held that he is so far relieved of his disability as to be able to contract for whatever is needed in the care and management of his property. Ordinarily his guardian would be authorized to make such contracts in his behalf.[3] But in no case can a tradesman recover of an infant for necessaries, when the infant is already supplied with them from some other source; the tradesman always acts at his peril in such cases, if he fails to make inquiries after the condition of the infant.[4]

§ 47. **Infant's contracts voidable, not void.** — Since the disability is imposed upon the infant for his own benefit and protection, and not in pursuance of any public policy, his contracts, of any kind, whether they be under seal or

[1] Darbe *v.* Boucher, 1 Salk. 279; Earle *v.* Peale, 1 Salk. 386; *s. c.* 10 Mod. 67; Randall *v.* Sweet, 1 Denio, 460; Price *v.* Sanders, 60 Ind. 310. But if the infant requests a third person to pay for the necessaries he has already bought, or is about to buy, he is obliged to repay the money so expended. Clarke *v.* Leslie, 5 Esp. 28; Swift *v.* Bennett, 10 Cush. 436; Conn *v.* Coburn, 7 N. H. 368; Smith *v.* Oliphant, 2 Sandf. 306; Haine *v.* Torrant, 2 Hill (S. C.), 400.

[2] Warwick *v.* Bruce, 2 M. & S. 205; Whywall *v.* Champion, 2 Stra. 1083; Dilk *v.* Keighley, 2 Esp. 480; Mason *v.* Wright, 13 Met. 306; Smith *v.* Kelley, 13 Met. 309; Lowe *v.* Griffith, 1 Scott, 458; Decell *v.* Lewenthal, 57 Miss. 331.

[3] Hall *v.* Butterfield, 59 N. H. 354; Bartlett *v.* Bailey, 59 N. H. 408; Rundell *v.* Keeler, 7 Watts, 237; Watson *v.* Hensel, 7 Watts, 344; Tupper *v.* Caldwell, 12 Met. 559; Price *v.* Sanders, 60 Ind. 310; Mathes *v.* Dobschuetz, 72 Ill. 438; Dillon *v.* Bowles, 77 Mo. 603; Epperson *v.* Nugent, 57 Miss. 45; Chapman *v.* Hughes, 61 Miss. 339; Huff *v.* Bournell, 48 Ga. 338.

[4] Barnes *v.* Toye, 13 Q. B. D. 410; Story *v.* Pery, 4 C. & P. 526; Cook *v.* Deaton, 3 C. & P. 114; Hoyt *v.* Casey, 114 Mass. 397; Johnson *v.* Lines, 6 Watts & S. 80; Kraker *v.* Byrum, 13 Rich. 163; Nicholson *v.* Wilborn, 13 Ga. 467; Nichol *v.* Steger, 6 Lea 393.

parol, with the exception of those for necessaries, just explained, are not absolutely void, but only voidable at his election, and may be enforced against the adult party.[1] It has been held that when a contract is clearly prejudicial to the interests of the infant, it is absolutely void.[2] But the authorities are not unanimous, many holding that all the infant's contracts are voidable only,[3] and perhaps the only foundation for the doctrine that the infant's contracts may be held to be void, when clearly prejudicial to him, is that the courts will during infancy avoid the contract, and secure a restitution of the property parted with under the contract, whenever such intervention is absolutely necessary for the infant's protection.

It is generally held that an infant's power of attorney

[1] Bruce *v.* Warwick, 6 Taunt. 118; Warwick *v.* Bruce, 2 M. & S. 205; Holt *v.* Clarencieux, 2 Stra. 937; Nightingale *v.* Withington, 15 Mass. 272; Thompson *v.* Hamilton, 12 Pick. 425; Irvine *v.* Irvine, 9 Wall. 617; Baker *v.* Lovett, 6 Mass. 78; Edgerton *v.* Wolf, 6 Gray, 453; Judkins *v.* Walker, 17 Me. 38; Thomas *v.* Dike, 11 Vt. 273; Hoxie *v.* Lincoln, 25 Vt. 206; Kendall *v.* Lawrence, 22 Pick. 540; Hunt *v.* Peake, 5 Cow. 475; Willard *v.* Stone, 7 Cow. 22; Bool *v.* Mix, 17 Wend. 119; Wallace *v.* Lewis, 4 Harr. (Del.) 75; Allen *v.* Poole, 54 Miss. 323; Haynes *v.* Slack, 32 Miss. 193; Bingham *v.* Barley, 55 Tex. 281; Chapman *v.* Chapman, 13 Ind. 396; Harrod *v.* Myers, 21 Ark. 592; Ferguson *v.* Bell, 17 Mo. 347; Lowe *v.* Sinklear, 27 Mo. 308; West *v.* Penny, 16 Ala. 186; Eureka Co. *v.* Edwards, 71 Ala. 248; Francis *v.* Felmit, 4 Dev. & Bat. 498; Mustard *v.* Wohlford, 15 Gratt. 329; Jenkins *v.* Jenkins, 12 Iowa, 195.

[2] Lumsden's Case, 4 Ch. Ap. 31; Robinson *v.* Weeks, 56 Me. 102; Oliver *v.* Houdlet, 13 Mass. 237; Owen *v.* Long, 112 Mass. 403; Swafford *v.* Ferguson, 3 Lea, 292; French *v.* McAndrew, 61 Miss. 187; Reg. *v.* Lord, 12 Q. B. 757; Fisher *v.* Mowbray, 8 East, 330.

[3] Hyer *v.* Hyatt, 3 Cranch C. C. 276; Fetrow *v.* Wideman, 40 Ind. 148; Flexner *v.* Dickerson, 72 Ala. 318. It has been held that an infant's contract of suretyship is absolutely void, because it cannot possibly be beneficial to him. Maples *v.* Wrightman, 4 Conn. 376. But it has been decided differently in the other courts. Owen *v.* Long, 112 Mass. 403; Williams *v.* Harrison, 11 S. C. 412; Harner *v.* Dipple, 31 Ohio St. 72; Fetrow *v.* Wiseman, 40 Ind. 148.

under seal is absolutely void.[1] And there are some authorities which deny that the infant can appoint an agent for any purpose, all his acts by his agent being not merely voidable, but absolutely void.[2] But, perhaps, the weight of authority is in favor of conceding to the infant the same measure of power to act by an agent, as by himself, his powers of attorney being held to be voidable only and not void. And this doctrine has been frequently applied to the signing of promissory notes and other commercial paper.[3]

§ 48. **An infant's notes and bills.** — It is plain that an infant cannot bind himself absolutely as the maker, indorser or acceptor of a negotiable instrument; and that, if such an instrument has any validity at all, it is voidable at the election of the infant:[4] yet, since the recognition of his power to make a voidable contract would enable him to raise the question of consideration against a *bona fide* holder, and thus destroy the negotiable character of the paper, or be held bound by his contract, it has been very generally held that an infant cannot make a note or bill, which will be valid for any purpose. It is held to be absolutely void.[5]

[1] Poof *v.* Stafford, 7 Cow. 179; Waples *v.* Hastings, 3 Harr. 403; Wambole *v.* Foote, 2 Dak. 1.

[2] Thomas *v.* Roberts, 16 M. & W. 778; Robbins *v.* Mount, 4 Rob. (N. Y.) 553; Armitage *v.* Wildoe, 36 Mich. 124; Tapley *v.* McGee, 6 Ind. 56; Trueblood *v.* Trueblood, 8 Ind. 195; Flexner *v.* Dickerson, 72 Ala. 318.

[3] Whitney *v.* Dutch, 14 Mass. 457; Towle *v.* Dresser, 73 Me. 252; Pottenger *v.* Steuart, 3 Harr. & J. 347; Hall *v.* Jones, 21 Md. 439; Belton *v.* Briggs, 4 Des. 465; Alsworth *v.* Cordtz, 31 Miss. 32; Ward *v.* The Little Red, 8 Mo. 358; Hastings *v.* Dollarhide, 24 Cal. 195.

[4] Young *v.* Bell, 1 Cranch C. C. 342; Reed *v.* Batchelder, 1 Met. 559; Williams *v.* Brown, 34 Me. 594; Earl *v.* Reed, 10 Met. 387; Wright *v.* Steele, 2 N. H. 51; Goodsell *v.* Myers, 3 Wend. 479; Everson *v.* Carpenter, 17 Wend. 419; Grace *v.* Hale, 2 Humph. 27; Baldwin *v.* Rosier, 1 McCrary, 384.

[5] Swasey *v.* Vanderheyden, 10 Johns. 33; McCrillis *v.* How, 2 N. H. 348; Conn *v.* Coburn, 7 N. H. 368; Alsop *v.* Todd, 2 Root, 105; Maples

Since the payment of a negotiable bill or note must be absolute and at all events, an infant's note or bill cannot be considered negotiable, and when all other contracts, except negotiable bills and notes, were non-assignable, it may be technically correct to hold that an indorsee cannot maintain an action in his own name against an infant on his note or bill.[1] But, in equity, he could be treated as an assignee, and sue in the name of the payee; and now in most of the States almost all *choses in action* are assignable, and this objection to the semi-validity of an infant's note or bill is now removed. It is difficult to see why an indorsee cannot recover of an infant, maker or drawer, if he fails to plead the defense of infancy. As Judge Sharswood said: "A note may be valid as such, though not negotiable; in other words, though it may be so circumstanced as to let in all inquiries as to its consideration in the hands even of a *bona fide* holder. So here, on proof that the maker is an infant, the negotiability of the note is at an end; but it does not cease to be a note. It may be sued on by the holder in his own name. He stands in the shoes of the original payee, and can recover whatever he would have been entitled to recover. If the note is voidable, then without ratification it cannot be sued on at all. The holder, at most, must be subrogated to the rights of the original payee, in an action against the infant in the name of the payee, or a declaration founded on the original consideration."[2] This seems to be recognized by a number of American cases to be the correct rule.[3] It is

v. Wrightman, 4 Conn. 376; Wamsley *v.* Lindenberger, 2 Rand. 478; Bouchell *v.* Clary, 3 Brev. 194; McMinn *v.* Richmonds, 6 Yerg. 9; Henderson *v.* Fox, 5 Ind. 489; Tandy *v.* Masterson, 1 Bibb, 330; Beeler *v.* Young, 1 Bibb, 519; Morton *v.* Steward, 5 Ill. App. 533.

[1] Earle *v.* Reed, 10 Met. 387.

[2] Note to Byles on Bills, p. 99 (*60).

[3] "I see no reason why he (the infant) may not be bound by a bond or bill of exchange. It is not true that no inquiry can be made into the

certainly true that when the note or bill is given for necessaries, the holder of the paper may in an appropriate action recover the value of the things furnished;[1] and if the paper be ratified when the infant becomes of age, it becomes so valid a contract, that the indorsee or holder may sue on it and recover without any allegation of a ratification.[2] Surely, these conclusions are altogether inconsistent with the doctrine that an infant's bill or note is absolutely void.

§ 49. **Infant as payee and indorser.** — Since the contracts of an infant are only voidable at his instance, and may be enforced against the adult contractor, there can be no objection to the legality of a note or bill that is made payable to an infant. He can enforce its payment by the maker or acceptor.[3] But it would seem impossible for the maker or acceptor to secure an absolute acquittance by payment to the infant payee, personally. The payment should be made to the guardian.[4]

The infant payee can also make an effective indorsement

consideration. The statutes against usury and gaming are every day set off as defenses to actions on bills of exchange and negotiable notes, even in the hands of innocent indorsees." Nott, Ch. in Dubois *v.* Wheddon, 4 McCord, 221; Haines Admr. *v.* Tarrant, 2 Hill (S. C.), 400. It has thus been held that the contract of an infant as surety is only voidable. Owen *v.* Long, 112 Mass. 403; Williams *v.* Harrison, 11 S. C. 412; Harner *v.* Dipple, 31 Ohio St. 72; Fetrow *v.* Wiseman, 40 Ind. 148.

[1] Bradley *v.* Pratt, 23 Vt. 378; Earle *v.* Reed, 10 Met. 387; Dubose *v.* Wheddon, 14 McCord, 221; Ray *v.* Tubbs, 50 Vt. 688; Russell *v.* Lee, 1 Lev. 86; Beeler *v.* Young, 1 Bibb, 519; Bateman *v.* Kingston, 6 L. R. (Ireland) 328.

[2] Hunt *v.* Massey, 5 Barn. & Ald. 902; Williams *v.* Moore, 11 M. & W. 266; Lawson *v.* Lovejoy, 8 Greenl. 405; Reed *v.* Batchelder, 1 Met. 559; Edgerly *v.* Shaw, 5 Foster, 514; Goodsell *v.* Myers, 3 Wend, 479; Cole *v.* Pennell, 2 Rand. 174; Wamsley *v.* Lindenberger, 2 Rand. 479; Cheshire *v.* Barrett, 4 McCord, 241; Little *v.* Duncan, 9 Rich. 55; King *v.* Jamison, 66 Mo. 498; West *v.* Penny, 16 Ala. 186.

[3] Teed *v.* Elworth, 14 East, 210; Warwick *v.* Bruce, 2 M. & S. 205; Holladay *v.* Atkinson, 5 Barr. & C. 501.

[4] Phillips *v.* Paget, 2 Ark. 80.

of the note or bill, and the maker or acceptor cannot refuse to pay the money to the indorsee, on the ground that the payee is incapacitated from making a lawful indorsement. By drawing the note or bill payable to the order of an infant, the maker is estopped from denying the capacity of the payee to indorse it.[1] But the infant's indorsement, so far as it binds him, is certainly voidable. He may not only avoid it, in order to relieve himself of the secondary liability for the payment as an indorser; but he may, also, by disaffirming the indorsement, recover of the maker or acceptor the money that was, by the terms of the instrument, payable to him, although it may have been already paid to the indorsee. The maker or acceptor of such commercial paper may in such a case be compelled to pay it twice; since, by making the bill or note payable to the order of an infant, he warrants the capacity of the payee to make a legal indorsement.[2] But if he disaffirms the indorsement, before the payment is made to his indorsee, and gives the proper notice to all parties, to his indorsee, as well as to the antecedent parties, indorsee cannot demand payment of the maker or acceptor, for he loses his title to the paper by the avoidance of the indorsement.[3]

[1] "It would be absurd to allow one who has made a promise to pay to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise." Parker, Ch. J., in Nightingale *v.* Withington, 15 Mass. 272; see also Grey *v.* Coopers, 3 Doug. 65; Taylor *v.* Croker, 4 Esp. 187; Drayton *v.* Dale, 2 B. & C. 293; Jones *v.* Darch, 4 Price, 300; Frasier *v.* Massey, 14 Ind. 352. The indorsement of an infant by his authorized agent has been held to be valid. Hardy *v.* Waters, 38 Me. 450.

[2] Smith *v.* Marsack, 6 C. B. 488; *s. c.* 18 L. J. C. P. 65; Taylor *v.* Croker, 4 Esp. 187; Goodsell *v.* Myers, 3 Wend. 479. But it has been claimed that there is no such double liability of the maker or acceptor, where the infant indorser is himself an indorsee, instead of being the original payee. The reason is obvious. Story on Bills, § 85, p. 98 (Bennett's ed.), note 2.

[3] Story on Notes, § 80.

In any such case, the infant cannot avoid the indorsement, without returning the consideration.[1]

It has been held that he cannot disaffirm until he becomes of age;[2] but it is probably the better rule that he may disaffirm at any time, and does not have to wait until he reaches his majority.[3]

§ 50. **Ratification of infant's bills and notes.**—The bill or note, executed by an infant, being voidable, may be ratified by him and become a binding contract when he becomes of age. After ratification, the bill or note will be as valid a contract, and of the same legal character, as if it had been originally executed by an adult, and inures to the benefit of every subsequent holder.[4] It has been held that a ratification will not validate a contract and rebut the defense of infancy in an action on the contract, unless it is made before the action was brought;[5] but this view has been severely criticised, and it is believed that in this country a ratification will remove the defect whenever it is made.[6]

It may be generally stated that no mere acknowledgment of the contract will amount to a ratification of an executory contract, such as the infant's bill of exchange or promissory note;[7]

[1] Melburg *v.* Watrous, 7 Hill, 110.

[2] Roof *v.* Stafford, 7 Cow. 179.

[3] Bool *v.* Mix, 17 Wend. 119; 2 Kent Com. *237.

[4] Hunt *v.* Massey, 5 Barn. & Ad. 902; Lawson *v.* Lovejoy, 8 Greenl. 405; Reed *v.* Batchelder, 1 Met. 559; Goodsell *v.* Myers, 3 Wend. 479; Edgerly *v.* Shaw, 5 Foster (N. H.), 514; Cheshire *v.* Barrett, 4 McCord, 241; Little *v.* Duncan, 9 Rich. 55; West *v.* Penny, 16 Ala. 186; King *v.* Jamison, 66 Mo. 498.

[5] Thornton *v.* Illingworth, 2 Barn. & C. 824.

[6] 1 Parsons' N. B. 72. But see Ford *v.* Phillips, 1 Pick. 202; Thing *v.* Libbey, 16 Me. 55; Merriam *v.* Wilkins, 6 N. H. 432.

[7] Smith *v.* Mayo, 9 Mass. 62; Ford *v.* Phillips, 1 Pick. 202; Thompson *v.* Lay, 4 Pick. 48; Proctor *v.* Sears, 4 Allen, 95; Hale *v.* Gerrish, 8 N. H. 374; Wilcox *v.* Roath, 12 Conn. 550; Dunlap *v.* Hale, 2 Jones (N. C.), 381; Armfield *v.* Tate, 7 Ire. 258; Conklin *v.* Ogborn, 7 Ind. 553; Alex-

nor would part payment,[1] nor a submission to arbitration, unless the award has been rendered.[2] Nothing short of a new promise to pay amounts to a ratification. But there need not be any formal promise. Any words expressing or implying a promise will suffice.[3]

No new consideration is needed,[4] but where the promise to pay is coupled with a condition, the condition must be performed, before the ratification is complete.[5] In England and some of the States a written ratification is required by statute,[6] but in the absence of a statute, the ratification need not be in writing; it may be, and usually is, by parol, and of the most informal character.[7]

§ 51. **Joint note or bill of infant and adult.** — Where a note or bill is executed jointly by an infant and an adult, it will, as a matter of course, be binding upon the adult in any event. But whether at common law suit may be brought against the adult alone, or should be instituted

ander *v.* Hutcheson, 2 Hawks, 535; Reed *v.* Boshears, 4 Sneed, 118; Thrupp *v.* Fielder, 2 Esp. 628; Benham *v.* Bishop, 9 Conn. 330; Whitney *v.* Dutch, 14 Mass. 460.

[1] Smith *v.* Mayo, 9 Mass. 62; Robbins *v.* Eaton, 10 N. H. 561; Catlin *v.* Haddox, 49 Conn. 492; Hinely *v.* Margaritz, 3 Barr, 428.

[2] Benham *v.* Bishop, 9 Conn. 330; Barnaby *v.* Barnaby, 1 Pick. 221.

[3] Hartley *v.* Wharton, 11 Ad. & El. 93; Bobs *v.* Hansel, 2 Bailey, 114; Whitney *v.* Dutch, 14 Mass. 460; Wright *v.* Steele, 2 N. H. 51; Owis *v.* Kimball, 3 N. H. 314; Martin *v.* Mayo, 10 Mass. 137.

[4] Smith *v.* Kelly, 13 Met. 309; Owis *v.* Kimball, 3 N. H. 314; Hoit *v.* Underhill, 10 N. H. 220; Goodsell *v.* Myers, 3 Wend. 479; Gay *v.* Ballou, 4 Wend. 419; Millard *v.* Hewlett, 19 Wend 301; Turner *v.* Gaither, 83 N. C. 357.

[5] Cole *v.* Saxby, 3 Esp. 159; Davies *v.* Smith, 4 Esp. 36; Thompson *v.* Lay, 4 Pick. 48; Proctor *v.* Sears, 4 Allen, 95; Everson *v.* Carpenter, 17 Wend. 419; Chandler *v.* Glover, 32 Pa. St. 509.

[6] 1 Daniel's Negot. Inst., § 236; Thurlow *v.* Gilmore, 40 Me. 378; Stern *v.* Freeman, 4 Met. (Ky.) 309.

[7] Martin *v.* Mayo, 10 Mass. 137; West *v.* Penny, 16 Ala. 186; Reed *v.* Broshears, 4 Sneed, 118.

against both, will depend upon the character of the infant's liability. If the instrument, as to the infant maker, is absolutely void, then his signature may be treated as surplusage, and he need not be joined in the suit.[1] But where the infant's commercial paper is voidable, and not void, the suit must be brought against both.[2] Where the infant is a partner in a firm, his continuance in the firm after reaching majority, will not constitute a ratification of the contracts made by the firm during his minority.[3]

§ 52. **Lunatics and imbeciles.** — According to the early English law, a man was not allowed to stultify himself by alleging his own lunacy or idiocy in defense of an action on his contract.[4] But this rule of the common law has been everywhere repudiated,[5] and the contract of a person, suffering from any form of dementia, is ordinarily held to be voidable.[6] If the lunatic has, by an inquisition of lunacy, been placed in charge of a committee or guardian, the judgment of lunacy is by many of the authorities held to be conclusive upon all parties, and that the contracts of such

[1] Burgess *v.* Merrill, 4 Taunt. 468; Chandler *v.* Parkes, 3 Esp. 76; Jaffray *v.* Frebain, 5 Esp. 47. See Taylor *v.* Dausby, 42 Mich. 84.

[2] Slocum *v.* Hooker, 12 Barb. 563; Cole *v.* Pennell, 2 Rand. 174; Wamsley *v.* Lindenberger, 2 Rand. 478.

[3] Crabtree *v.* May, 1 B. Mon. 289.

[4] Beverley's Case, 4 Rep. 126; Stroud *v.* Marshall, Cro. Eliz. 398; 1 Parsons on Contracts, 383.

[5] Thornton *v.* Appleton, 29 Me. 298; Mitchell *v.* Kingman, 5 Pick. 431; Seaver *v.* Phelps, 11 Pick. 304; Grant *v.* Thompson, 4 Conn. 203; Lang *v.* Whidden, 2 N. H. 435; Rice *v.* Pelt, 15 Johns. 503; Bensell *v.* Chancellor, 5 Whart. 371; Turner *v.* Rusk, 53 Md. 65; Ballew *v.* Clark, 2 Ire. 23; Folson *v.* Garner, 15 Mo. 494; Webster *v.* Woodford, 3 Day, 90.

[6] Arnold *v.* Richmond Iron Works, 1 Gray, 434; Gibson *v.* Soper, 6 Gray, 279; Allis *v.* Billings, 6 Met. 415; Jackson *v.* Gumaer, 2 Cow. 552; Moore *v.* Hershey, 9 Norris (Pa.). 196; Turner *v.* Rusk, 53 Md. 65; McClain *v.* Davis, 77 Ind. 419; N. W. Mut. Ins. Co. *v.* Blankenship, 94 Ind. 535; Elston *v.* Jasper, 45 Tex. 409; Campbell *v.* Kuhn, 45 Mich. 531; Allen *v.* Berryhill, 27 Iowa, 534; Halley *v.* Troester, 72 Mo. 73.

a lunatic are void, and not voidable.[1] But other authorities declare the judgment of lunacy to be only *prima facie* evidence of lunacy, except as to those who were parties to the inquisition, and hold the contracts of one, who has been thus declared a lunatic, to be only voidable.[2]

Mere weakness of mind, or want of business capacity, will not constitute such a dementia, as will in the absence of fraud affect the validity of a contract.[3] Nor will every monomania,[4] nor even every general insanity,[5] necessarily affect the capacity of a person to enter into a lawful contract.[6] In order that insanity may constitute a good defense to an action on a contract, the derangement of the mind must be of such a character, and so great, as that the person so afflicted is unable to comprehend the subject of the contract or appreciate its nature and probable consequences.[7]

[1] Nichol *v.* Thomas, 53 Ind. 42; Freed *v.* Brown, 55 Ind. 310; Pearl *v.* McDowell, 3 J. J. Marsh. 658; Mohr *v.* Tulip, 40 Wis. 66; Griswold *v.* Butler, 3 Conn. 227; Fitzhugh *v.* Wilcox, 12 Barb. 235; Wadsworth *v.* Sharpsteen, 4 Seld. 388; Imhoff *v.* Whitmer, 7 Casey (Pa.), 243; Elston *v.* Jasper, 45 Tex. 409. See Van Deusen *v.* Sweet, 51 N. Y. 378; Allen *v.* Allen, 9 Fost. (N. H.) 106; Edwards *v.* Davenport, 20 Fed. Rep. 756; *s. c.* 4 McCrary, 34.

[2] Little *v.* Little, 13 Gray, 264; Hart *v.* Deamer, 6 Wend. 497; Jacobs *v.* Richards, 18 Beav. 300; Yanger *v.* Skinner, 1 McCart. 389; Parker *v.* Davis, 8 Jones (N. C.), 460; Hopson *v.* Boyd, 6 B. Mon. 296.

[3] Farnum *v.* Brooks, 9 Pick. 212; Osmond *v.* Fitzroy, 3 P. Wms. 129; Stewart *v.* Lispenard, 26 Wend. 299; Lawrence *v.* Willis, 75 N. C. 471; Lewis *v.* Pead, 1 Ves. jr. 19.

[4] Burges *v.* Pollock, 53 Iowa, 273; West *v.* Russell, 48 Mich. 74; Boyce *v.* Smith, 9 Gratt. 704; Lozear *v.* Shields, 8 C. E. Green, 509.

[5] Searle *v.* Galbraith, 73 Ill. 269.

[6] It follows that those who are merely deaf and dumb, deaf-mutes, are not incapacitated on account of these physical disabilities, if they are provided with some other means of manifesting their assent. Brown *v.* Brown, 3 Conn. 299; Brower *v.* Fisher, 4 Johns. Ch. 441; Barnett *v.* Barnett, 1 Jones Eq. 221; Christmas *v.* Mitchell, 5 Ire. Eq. 535.

[7] Hovey *v.* Hobson, 55 Me. 256; Hovey *v.* Chase, 52 Me. 304; Somes *v.* Skinner, 16 Mass. 348; Farnam *v.* Brooks, 9 Pick. 212: Bond *v.* Bond, 7

But where the monomania affects his understanding of the business transaction, the fact that he is otherwise of sound mind will not prevent the avoidance of the contract on the ground of insanity.[1]

§ 53. **Effect of insanity, when unknown to other party.** — It has been very curiously and anomalously held, in many cases, both in England and in this country, that where the party, dealing with the lunatic, is ignorant of his insanity, does not take advantage of him, acts in good faith in every respect, and there was nothing in the actions of the insane person to arouse the suspicions of any reasonably observant person, the contract cannot be avoided by the lunatic.[2]

But it is certainly anomalous doctrine that the lunatic is bound by his contract, if the other contracting party was ignorant of his lunacy. Since his capacity depends upon his own mental condition, and the law, declaring the lunatic to be incapable of making a binding contract, is enacted for his protection against his own acts, it is difficult

Allen, 1; Brown *v.* Brown, 108 Mass. 386; Dennett *v.* Dennett, 44 N. H. 531; Odell *v.* Buck, 21 Wend. 142; Lozear *v.* Shields, 8 C. E. Green, 509; Smith *v.* Beatty, 2 Ired. Eq. 456; Hill *v.* Day, 7 Stew. Ch. 150; Siemon *v.* Wilson, 3 Edw. Ch. 36; Edwards *v.* Davenport, 20 Fed. Rep. 756; *s. c.* 4 McCrary, 34; Smith *v.* Elliott, 1 Pat. & H. 307; Musselman *v.* Cravens, 47 Ind. 1; Miller *v.* Craig, 36 Ill. 109; Henderson *v.* McGregor, 30 Wis. 78; Speers *v.* Sewell, 4 Bush, 239.

[1] Riggs *v.* Am. Tract Soc., 95 N. Y. 503.

[2] Paxon, J., in Moore *v.* Hershey, 90 Pa. St. 196. See, also, to same general effect, that lunacy is no defense, where it is unknown, Molton *v.* Cameron, 4 Exch. 17; Elliott *v.* Ince, 7 DeG. M. & G. 478; Dane *v.* Kirkall, 8 C. & P. 679; Brown *v.* Todrell, 3 C. & P. 30; Loomis *v.* Spencer, 2 Paige, 153; Mutual Life Ins. Co. *v.* Hunt, 79 N. Y. 541; Matthieson *v.* McMahan, 38 N. J. 536; Beals *v.* Shee, 10 Pa. St. 56; Lancaster Co. Bk. *v.* Moore, 78 Pa. St. 407; Wilder *v.* Weakley, 34 Ind. 181; Behrens *v.* McKenzie, 23 Iowa, 333; N. W. Mut. Ins. Co. *v.* Blankenship, 94 Ind. 535; Copenrath *v.* Kienby, 83 Ind. 18; Riggan *v.* Green, 80 N. C. 236.

to see on what principle his liability can be made to depend upon the ignorance or knowledge of the other party. It would seem to be a better rule that a lunatic's contract is voidable, whether the other party is ignorant of, or acquainted with his mental condition, and such has been held to be the proper rule in the cases cited below.[1]

§ 54. **Lunatic's contracts for necessaries.** — Like the infant, the lunatic has the power to contract for necessaries, not only for himself, but also for his dependent family; or, rather, the law permits whoever furnishes the lunatic and his family with necessaries to recover their value; and the lunatic's note or bill given for necessaries will be enforcible to the extent of their actual value.[2] As in the case of infants, what are to be included in necessaries can only be determined by a consideration of what is fitting for one having the means and social standing of the lunatic.[3]

§ 55. **Ratification of lunatic's contracts.** — Since the contracts of the insane person are only voidable, not void, they may be ratified or disaffirmed by the lunatic, either during a lucid interval, or whenever he is permanently re-

[1] Sentance *v.* Poole, 3 C. & P. 1; Seaver *v.* Phelps, 11 Pick. 304; Hovey *v.* Hobson, 53 Me. 451; Rogers *v.* Blackwell, 49 Mich. 192; Van Patton *v.* Beals, 46 Iowa, 63; Edwards *v.* Davenport, 20 Fed. Rep. 756; *s. c.* 4 McCrary, 34.

[2] Stedman *v.* Hart, 1 Kay 607; Baxter *v.* Portsmouth, 5 B. & C. 170 (2 C. & P. 178); In re Weaver, 21 Ch. D. 615; Read *v.* Legard, 6 Exch. 636; Davidson *v.* Wood, 1 De G. J. & S. 465; McCullis *v.* Bartlett, 8 N. H. 569; La Rue *v.* Gilkyson, 4 Pa. St. 375; Richardson *v.* Strong, 13 Ired. 106; Pearl *v.* McDowell, 3 J. J. Marsh. 658; Fitzgerald *v.* Reed, 9 Smed. & M. 94; McCormick *v.* Littler, 85 Ill. 62; Darby *v.* Cabanne, 1 Mo. App. 126; Van Patton *v.* Marks, 46 Iowa, 63.

[3] Baxter *v.* Portsmouth, 7 Dow. & Ry. 614 (2 C. & P. 178). In Williams *v.* Wentworth, 5 Beav. 325, a lunatic's contracts for the repair or preservation of his estate were held to be binding upon him. See Surles *v.* Pipkin, 69 N. C. 513.

stored to sanity.[1] Or they may be ratified or disaffirmed by the committee or guardian, during his insanity,[2] or in the event of his death by his personal representatives.[3]

§ 56. **Lunatic, as payee and indorser.** — Of course, a lunatic may be a payee in a bill or note, and unless he chooses to demand a return of the consideration, he or his guardian may compel payment to him. He may also indorse the paper to another, and even though he may afterwards disaffirm the contract, and demand the return of the consideration, the *bona fide* indorsee may recover of the maker, for when one makes a note or bill payable to the order of any one, he warrants the capacity of that person to make a lawful indorsement.[4] But this estoppel against the maker only applies to the cases in which the payee was insane at the execution of the paper. If the payee becomes insane subsequently, his indorsement is voidable, if not void.[5]

§ 57. **The contracts of drunken persons.** — Drunkenness is, in legal contemplation, an aberration of mind, similar in its effect upon the reasoning faculties as temporary insanity. Hence we find that the legal effect of contracts, made by one in a state of intoxication, is affected in the same

[1] Arnold *v.* Richmond Iron Works, 1 Gray, 434; Gibson *v.* Soper, 6 Gray, 279; Allis *v.* Billings, 6 Met. 415; Turner *v.* Rusk, 53 Md. 65; N. W. Mut. Fire Ins. Co. *v.* Blankenship, 94 Ind. 535; Elston *v.* Jasper, 45 Tex. 409.

[2] Moore *v.* Hershey, 90 Pa. St. 196; McClain *v.* Davis, 77 Ind. 419; Halley *v.* Froester, 72 Mo. 73.

[3] Campbell *v.* Kuhn, 45 Mich. 513; Schuff *v.* Ransom, 79 Ind. 458.

[4] Smith *v.* Marsack, 6 C. B. 486. In Peaslee *v.* Robbins, 3 Met. 164, it was held that the insanity of the payee may be shown, in an action by an innocent indorser against the maker; but this case has been very severely criticised, and is not believed to be a reliable authority. Bigelow on estoppel, 450, 451.

[5] Alcock *v.* Alcock, 3 Man. A. G. 268.

way by the intoxication of the contractor, as they are by his insanity. His contracts and commercial paper will not be invalidated by the fact that he was under the influence of intoxicating liquor when he made them, if he was not bereft of his reason.[1] The intoxication must be so great that the person cannot comprehend the nature of the business, or the character of the instrument he is signing.[2] Even an habitual drunkard's contracts are valid, if they are made when he is not so intoxicated that he cannot understand the business.[3] But where a disadvantageous contract is made with one whose mind has become enfeebled by habitual drunkenness, and the other party knew of his mental weakness, the courts will presume fraud, and avoid the contract, in the absence of counter proof of fair dealing.[4] It is not necessary that the drunkenness of the person be procured by the other contracting party, in order that the contract may for this reason be avoided.[5] But if it was so procured, with the intention to take advantage of him, it would be a case of fraud, and the contract could be

[1] Caulkins *v.* Fry, 35 Conn. 170; Reinicker *v.* Smith, 2 Harr. & J. 421 Woods *v.* Pindal, Wright (Ohio), 507; Henry *v.* Ritenour, 31 Ind. 136; Belcher *v.* Belcher, 10 Yerg. 121; Morris *v.* Nixon, 7 Humph. 579; Cavender *v.* Waddingham, 5 Mo. App. 457; Reynolds *v.* Dechaums, 24 Tex. 174; Pickett *v.* Sutter, 5 Cal. 412.

[2] Pitt *v.* Smith, 3 Camp. 33; Molton *v.* Camroux, 2 Exch. 487; 4 Exch. 17; Gore *v.* Gibson, 13 M. & W. 623; Wigglesworth *v.* Steers, 1 Hening & M. 154; Clark *v.* Caldwell, 6 Watts, 139; Jenness *v.* Howard, 6 Blackf. 240; Dulaney *v.* Green, 4 Harr. 285; Drummond *v.* Hopper, 4 Harr. 327; Johns *v.* Fritchey, 39 Md. 258; Wilson *v.* Briggs, 7 Watts & S. 111; Berkley *v.* Cannon, 4 Rich. 136; Williams *v.* Inabnet, 1 Bailey, 343; Cummings *v.* Henry, 10 Ind. 109; Wyck *v.* Brasher, 81 N. Y. 260; Bates *v.* Ball, 72 Ill. 108; Schramm *v.* O'Connor, 98 Ill. 539.

[3] Ritter's Appeal, 9 Smith (Pa.), 9; Miller *v.* Finley, 26 Mich. 249.

[4] Holland *v.* Barnes, 53 Ala. 83. In this case a note based on insufficient consideration was thus obtained from one who was partially intoxicated and enfeebled by habitual drinking.

[5] Wigglesworth *v.* Steers, 1 Hen. & M. 70; Freeman *v.* Staats, 4 Halst. Ch. 814; French *v.* French, 8 Ohio, 214; Donelson *v.* Posey, 13 Ala. 752.

avoided, although the intoxication did not deprive him of his mental faculties completely.[1] Indeed, any undue advantage, taken of a man's intoxication will avoid a contract which he would not have made if he was sober.[2]

It has been held that complete intoxication will not invalidate a note or bill, made while in that condition, if it has passed into the hands of a *bona fide* holder.[3] But it would seem that if drunkenness deprived an individual of his contractual capacity, there is no valid contract, and hence a *bona fide* holder cannot acquire any absolute right against the maker of such an instrument.[4] The contracts of a drunken person, like those of a lunatic, are voidable, and may be ratified or disaffirmed by the person, when he becomes sober.[5] And if he retains and enjoys the consideration, after his recovery from intoxication, his actions will constitute a ratification of the contract.[6]

§ 58. **The disability of all persons under guardianship — Spendthrifts.** — As in the case of infancy or lunacy, so may one be placed under guardianship for other causes which render him more or less unable to take care of himself; for example, the habitual drunkard and spendthrift. Any one who is for any cause placed under a guardian and deprived of the control of his property, is consequentially

[1] Say *v.* Barwick, 1 Ves. & B. 195; Wilcox *v.* Jackson, 51 Iowa, 208.

[2] Burroughs *v.* Richman, 1 Green (N. J.), 233; Butler *v.* Mulvihill, 1 Bligh, 137; Birdsong *v.* Birdsong, 2 Head, 289; Murray *v.* Carlin, 67 Ill. 286; White *v.* Cox, 2 Hayw. 79; Mansfield *v.* Watson, 2 Iowa, 111; Henry *v.* Ritenour, 31 Ind. 136.

[3] Johnson *v.* Medlicott, 3 P. Wms. 130; State Bank *v.* McCoy, 69 Pa. St. 204; McSparran *v.* Neely, 91 Pa. St. 17.

[4] In Hawkins *v.* Bone, 4 Fost. & F. 311, it was held that it was not necessary for the other party to know of the intoxication, in order to invalidate the contract.

[5] Matthews *v.* Baxter, L. R. 8 Ex. 132; Calkins *v.* Fry, 35 Conn. 170.

[6] Gore *v.* Gibson, 13 M. & W. 623; Williams *v.* Inabnet, 1 Bailey, 343; Joest *v.* Williams, 42 Ind. 565. But see Reinskopf *v.* Ragge, 37 Ind. 207.

deprived of the power to make a negotiable instrument.[1] It has thus been held that the indorsement by a spendthrift of a note payable to him is void.[2]

§ 59. **Disability of Coverture — Commercial paper of married women.** — At common law, the legal personality of the woman was completely merged in that of the husband, and with the loss of her legal personality she was also deprived of the control of her property and of her contractual powers.[3] Of late years, in this country, a tendency has been manifested generally to break away from these common-law rules of disability of coverture, and since the legislative powers of the different States are acting independently of each other and without concert, we naturally find the existing law of married women to vary in detail with each State, in almost all of which there is found a variable divergence from the common-law rules. In consequence of the general character of a treatise like the present, it will be impossible to state the statutory law of each State, and any attempt to make a general statement of the statutory modifications would be more or less misleading. It has consequently been deemed advisable not to make such an attempt, and confine the present statements to a consideration of the common-law rules, warning the reader to look for modifications in the statutes of the State, in which the commercial paper of a married woman is made or is payable. According to the common law, a married

[1] Mansfield *v.* Felton, 13 Pick. 206; Chew *v.* Bank of Baltimore, 14 Md. 299.

[2] Lynch *v.* Dodge, 130 Mass. 458. For the constitutional limitations upon the power of the State to deprive a spendthrift of the control of his property, and to place him under guardianship, see Tiedeman's Limitations of Police Power, § 138.

[3] For a consideration of the reasons that induced the subjection of the wife and her property to the control of the husband, see Tiedeman's Limitations of Police Power, §§ 161-163.

woman cannot make or accept or indorse a commercial instrument, and her attempted execution, acceptance or indorsement of such an instrument is absolutely void.[1] So completely void is the married woman's note or bill, that her promise after the death of her husband to pay such a note or bill is not binding upon her, unless it is based upon a new consideration.[2]

§ 60. **Effect of marriage on ante-nuptial notes and bills.** — If a woman, while single, executes a note or bill, and marries before it is paid, the liability for its payment is imposed by the law upon the husband during the marriage. Although, in theory, this obligation of the husband for the ante-nuptial debts of his wife rests upon the supposition that he has come into possession of all her property, and hence the creditors cannot secure payment from her, yet his liability for these debts is not limited to the amount of property he has acquired from his wife; nor does it depend upon his knowledge of their existence at the time of the marriage. He is liable, even if she comes to him without any dowry, and laden with debts, whose existence has been concealed from him.[3] In all such cases the husband and wife must be sued jointly.[4] But the liability of the husband, and of his property, for the ante-nuptial notes and bills of his wife expires with the termination of the coverture, whether it closes with the death of either of them or by divorce. If the husband dies before action is

[1] Mason *v.* Morgan, 2 Ad. & El. 30; Haly *v.* Lane, 2 Atk. 181; Howe *v.* Wildes, 34 Me. 566; Kemoorphy *v.* Sawyer, 125 Mass. 29; Van Steenburgh *v.* Hoffman, 15 Barb. 28; Chouteau *v.* Merry, 3 Mo. 254.

[2] Loyd *v.* Lee, 1 Strange, 94; Littlefield *v.* Spee, 2 B. & Ad. 811; Meyer *v.* Haworth, 8 Ad. & El. 467; Eastwood *v.* Kenyon, 11 Ad. & El. 438; Watkins *v.* Halstead, 2 Sandf. 311; Vance *v.* Wells, 6 Ala. 737; *s. c.* 8 Ala. 399; Hetherington *v.* Hixon, 46 Ala. 297.

[3] 1 Blackst. Com. 443; 2 Kent Com. 143-146; Schouler's Domestic Relations, 69; 1 Daniel's Negot. Inst., § 258.

[4] Mitchinson *v.* Hewson, 7 T. R. 348.

instituted, his surviving wife will alone be liable and not his estate; and in the event of her death, during the lifetime of the husband, action must be brought against her personal representatives.[1] And all her property, remaining at her death, including her *choses in action*, not reduced to possession by the husband, will be liable in the hands of her administrator for these debts.[2]

§ 61. **Exceptions to married woman's contractual disability.** — There are several exceptional cases, in which the married woman is given by the law the power to contract and execute legal bills and notes. The first case is where the husband is an alien or civilly dead. If the husband is an alien enemy, he is prevented by law from coming to her aid; it is therefore necessary for her own maintenance and support to have the power to contract, and the law concedes this power to her. So also where the husband is simply an alien, and has never resided in this country, particularly when he is prohibited by the laws of his own country from leaving the realm without the permission of the State authority.[3] In Massachusetts it has been held that the States of the American Union are foreign States so far that a husband is treated as an alien, who lives in a different State from that in which his wife resides. She has in such a case the same powers of a *feme sole*, which are conceded to her, when her husband lives and has always lived in a foreign land.[4] But if the alien has once lived in the same State or country with his wife, and has

[1] Woodman *v.* Chapman, 1 Camp. 189; Curtton *v.* Moore, 2 Jones' Eq. 204; 2 Kent Com. 144; Byles on Bills, (*66), 110.

[2] Heard *v.* Stamford, 3 P. Wms. 409; Morrow *v.* Whitsides, 10 B. Mon. 411; 1 Parsons' N. & B. 86.

[3] Derry *v.* Duchess of Mazarine, 1 Ld. Raym. 147; Kay *v.* Duchesse de Peinne, 3 Camp. 123; Gregory *v.* Paul, 15 Mass. 31; McArthur *v.* Bloom, 2 Duer, 151.

[4] Abbott *v.* Bailey, 6 Pick. 89.

gone abroad, she does not acquire the rights of a *feme sole*, until, by a seven years' absence, and without communication or intelligence of him during that time, he is presumed by the law to be dead.[1] In Massachusetts, permanent desertion and departure of the husband to a foreign State, restore the powers of a single woman to the wife, and she can then make binding contracts.[2] But a contrary decision was reached in a similar case by the Supreme Court of Missouri. The court say: "Coverture operates a legal disability to contract, and all contracts of a *feme covert* are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in these cases do not apply. If by a removal from one State to another, or a separate residence in different States, the indissoluble connection by which the wife is placed under the power and protection of her husband could be cancelled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of troubling the legislature or the courts on the subject of divorces.[3] The married woman is, for like reasons, not restored to the legal freedom of a single woman, when she is merely living apart from her husband;[4] or when she has been divorced from her husband *a mensa et thoro*.[5] But all absolute divorces, whether common-law or statutory, will remove from the married woman her marital disabil-

[1] Kay *v.* Duchesse de Peinne, 3 Camp. 123; Loring *v.* Sleineman, 1 Met. 204.

[2] Gregory *v.* Paul, 15 Mass. 31.

[3] Chouteau *v.* Merry, 3 Mo. 254.

[4] Marshall *v.* Rutton, 8 T. R. 545; Hatchett *v.* Baddeley, 2 W. Black, 1079; Lean *v.* Schultz, 2 W. Black. 1195; Hyde *v.* Price, 3 Ves. jr. 443.

[5] Fairthorne *v.* Blaquire, 6 Maule & S. 73; Lewis *v.* Lee, 3 Barn. & C. 291. The rule is different in Massachusetts. Dean *v.* Richmond, 5 Pick. 461.

ities, since these divorces operate as a complete dissolution of the marriage tie.[1] Imprisonment, banishment or transportation, or the renunciation of civil life by the entry into a monastery or convent, have been held to dissolve the marriage tie so far as to restore the married woman to the contractual and property rights of a single woman.[2] By the custom of London, a married woman was allowed to become a merchant on her own account, to be a *sole trader*, as she was called. As a sole trader, she had the incidental power to make all contracts necessary for the prosecution of her separate business.[3] In the United States, a similar power is some times granted by statute to make all contracts, including all kinds of commercial paper, in the capacity of a sole trader.[4] But in the absence of statutory authority, the married woman cannot become a trader, except by the consent of her husband; and, of course, his consent makes him a responsible party to the business.[5]

§ 62. **Commercial paper of married woman with a separate estate.** — In order to relieve married women of the hardships that ordinarily result from her common-law disabilities, as soon as the conception of an equitable estate in property apart from the legal title was fully developed, the English Court of Chancery so construed the equitable

[1] Chamberlaine *v.* Hewson, 5 Mod. 71; 1 Daniel's Negot. Inst., § 243; Story on Bills, § 90; 1 Parsons' N. & B. 78.

[2] Hatchett *v.* Baddeley, 2 W. Blackst. 1079; Ex parte Franks, 7 Bing. 762; 2 Kent Com. 136.

[3] Beard *v.* Webb, 2 B. & P. 93; Byles on Bills (*63), 105.

[4] Camden *v.* Mulen, 29 Cal. 566.

[5] Richardson *v.* Merrill, 32 Vt. 27; Partridge *v.* Stocker, 36 Vt. 108; James *v.* Taylor, 43 Barb. 530; Todd *v.* Lee, 16 Wis. 480; Moses *v.* Fogartie, 2 Hill (S. C.), 335; Abbott *v.* Mackinley, 2 Miles, 220. But it has been held in New York that if a husband authorizes his wife to execute notes, in order that the notes may be binding upon the husband, they must purport on their face to have been given by the wife, as agent or on behalf of the husband. Minard *v.* Mead, 7 Wend. 68.

estate that it was held by its owner free from all the common-law restrictions and qualities, which hampered the enjoyment of the property, or which for some other reason were found to be burdensome. It thus became the rule of equity, that a married woman could hold and enjoy, separate from and beyond the control of the husband, any property that was settled on her as an equitable estate *to her sole and separate use*.[1] In making a conveyance to the separate use of a married woman, her power of alienation and disposition may, by a special clause, be restricted or taken away entirely during the marriage.[2] In the absence of such a restraining clause in England and in most of the United States, a married woman is to be treated, in respect to her separate property, as a *feme sole*, and she may dispose of the equitable estate as she pleases.[3] In a number of the States, however, the English rule has been discarded and the contrary doctrine maintained, that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed of settlement.[4]

[1] See Tiedeman on Real Property, § 469.

[2] Hawkes *v.* Hubback, L. R. 11 Eq. 5; In re Gaffee's Trusts, 1 Macn. & G. 541; Tullett *v.* Armstrong, 4 My. & Cr. 377; Waters *v.* Tazewell, 9 Md. 291; Fellows *v.* Taun, 9 Ala. 999; Shirley *v.* Shirley, 9 Paige, 363; Fears *v.* Brooks, 12 Ga. 195; Baggett, *v* Meux, 1 Phil. 627. But see Dubs *v.* Dubs, 31 Pa. St. 149; Miller *v.* Bingham, 1 Ired. 423.

[3] Fettiplace *v.* Gorges, 1 Ves. 46; Rich *v.* Cockerill, 9 Ves. 69; Wagstaff *v.* Smith, 9 Ves. 520; Sturgis *v.* Corp., 13 Ves. 190; Major *v.* Lansley, 2 Russ. & My. 357; Essex *v.* Atkins, 14 Ves. 542; Dyett *v.* North Am. Coal Co., 20 Wend. 570; *s. c.* 7 Paige Ch. 1; Powell *v.* Murray, 2 Edw. Ch. 636; Gardner *v.* Gardner, 32 Wend. 526; Yale *v.* Dederer, 18 N. Y. 269; Imlay *v.* Huntington, 20 Conn. 175; Leaycraft *v.* Hedden, 3 Green Ch. 551; Wyly *v.* Collins, 9 Ga. 223; Cooke *v.* Husbands, 11 Md. 492; Chew's Admr. *v.* Beall, 13 Md. 348; McCroan *v.* Pope, 17 Ala. 612; Collins *v.* Larenburg, 19 Ala. 685; Coleman *v.* Woolley, 10 B. Mon. 320; Hardy *v.* Van Harlinger, 7 Ohio St. 208; Whitesides *v.* Cannon, 23 Mo 457; Segoud *v.* Garland, 23 Mo. 547; Frazier *v.* Brownlow, 3 Ired. Eq. 237; Newlin *v.* Freeman, 4 Ired. 312.

[4] Ewing *v.* Smith, 3 Desa. 417; Reed *v.* Lamar, 1 Strobh. Eq. 27; Cal-

Accordingly, we find that in England, as in those States in which the married woman has in respect to her separate estate the powers of a single woman, and in all other States when these powers are expressly reserved to her, all her contracts, including her commercial paper, which are made on the faith of the separate estate, can be enforced against it. In England, her separate estate is liable for all of her debts, for it is presumed that credit was given to her in any case on the faith of the liability of the separate estate.[1] And this is also the rule in many of the States, denying the necessity of any express charge of the debt on the estate, or even the appropriation of the consideration to the benefit of her estate.[2] But in New York, it has been held that in order that a married woman's separate estate may be charged with her debts, the intention to so charge it must be declared in the contract of

houn *v.* Calhoun, 2 Strobh. 231; Magwood *v.* Johnson, 1 Hill Ch. 228; Lancaster *v.* Dolan, 1 Rawle, 231; Wallace *v.* Costan, 9 Watts, 137; Thomas *v.* Folwell, 2 Whart. 11; Patterson *v.* Robinson, 1 Casey, 81; Metcalf *v.* Cook, 2 R. I. 355; Williamson *v.* Beckham, 8 Leigh, 20; Morgan *v.* Elam, 9 Yerg. 375; Marshall *v.* Stephens, 8 Humph. 159; Doty *v.* Mitchell, 9 Smed. & M. 447; Montgomery *v.* Agricultural Bank, 10 Smed. & M. 567.

[1] Bulfin *v.* Clarke, 17 Ves. 366; Hulme *v.* Tenant, 1 Bro. C. C. 16; Bingham *v.* Noyes, Chitty on Bills, (21) 28; Stewart *v.* Lord Kirkwall, 3 Mad. Ch. 387.

[2] Wicks *v.* Mitchell, 9 Kan. 80; Bell *v.* Kellar, 13 B. Mon. 381; Metropolitan Bk. *v.* Taylor, 62 Mo. 338; Morrison *v.* Thistle, 67 Mo. 596; Grapergether *v.* Fejervary, 9 Iowa, 163; Todd *v.* Lee, 15 Wis. 365; Major *v.* Symmes, 19 Ind. 117; Williams *v.* Urmston, 35 Ohio St. 296, (overruling Levi *v.* Earle, 30 Ohio St. 147); Pentz *v.* Simeon, 2 Beasley, 232; Rogers *v.* Ward, 8 Allen, 387; Garland *v.* Pamplin, 32 Gratt. 303. In Frank *v.* Lilienfeld, 33 Gratt. 349, Burks, J., said: "It is necessary that it (the contract of the married woman) be entered into with reference to, and in the credit of, the separate estate. There must be an intention to make the separate estate liable. It need not, however, be express; it may be implied. It is implied when the wife executes a bond, note, or other instrument for the payment of money, either as principal or as surety for another, even for her husband, no undue influence being used."

indebtedness itself; or it must be shown that the consideration of the debt was obtained for the benefit of the estate.[1] The charge upon the separate estate is a rule in equity, designed to offset the favor shown to married women, in violation of the common-law rule of disability. As it has been explained by an English chancellor,[2] "the separate property of a married woman, being a creature of equity, it follows that if she had a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied." There is, therefore, in such a case no personal liability for the debt.[3] But any separate property she might own at the time of trial and judgment will be liable,[4] unless the debt has been made a special charge upon a particular piece of property; when the right of recovery will be confined to that property, and the remainder of her separate estate will not be liable.[5]

[1] Yale *v.* Dederer, 22 N. Y. 450; *s. c.* 18 N. Y. 265 (overruling same case in 21 Barb. 286); White *v.* McNett, 33 N. Y. 371; Ledlie *v.* Vrooman, 41 Barb. 109; Corn Exchange Ins. Co. *v.* Babcock, 42 N. Y. 613; Second Nat. Bk. *v.* Miller, 60 N. Y. 639; Conlin *v.* Cantrell, 64 N. Y. 219. See, also Kenton Ins. Co. *v.* McClellan, 43 Mich. 564; Heugh *v.* Jones, 32 Pa. St. 432. But the note of the married woman, given for money expressed to be applied to the separate estate, will be binding upon the estate, although she afterwards makes some other use of it. McVey *v.* Cantrell, 70 N. Y. 295. *Contra*, Heugh *v.* Jones, 32 Pa. St. 432.

[2] Lord Chancellor Cottenham in Owens *v.* Dickenson, 1 Craig & Ph. 48.

[3] Lloyd *v.* Lee, 1 Strange, 94; Littlefield *v.* Shee, 2 B. & Ad. 84; Leer *v.* Muggridge, 5 Taunt. 36.

[4] Todd *v.* Ames, 60 Barb. 462.

[5] See Kimm *v.* Weippert, 46 Mo. 532; Wolf *v.* Van Metre, 23 Iowa, 397.

§ 63. **Married woman as payee and indorser.** — According to the early common law, the married woman was held to be incapable of being a legal obligee or grantee, without the consent of her husband; but if he assents to it during the marriage, neither she nor her heirs can disaffirm the contract or grant after his death.[1] Whether this rule will be now recognized as governing the capacity of a married woman to be the payee in commercial paper, is doubtful. But it is certainly true that if she is the payee, whether the paper was executed before or after the marriage, she cannot recover or exact payment of the maker, drawer or acceptor; nor will payment to her discharge the persons liable on the paper. Only the husband can receive payment, and maintain actions on the wife's *choses in action*.[2] Although it has been held differently,[3] it is now well settled that all negotiable instruments are *choses in action*.[4] The married woman, therefore, who is payee in a negotiable instrument, cannot pass a legal title, to the instrument nor bind herself in any way by an indorsement, without the consent of the husband.[5] The husband may indorse and

[1] Butter *v.* Baker, 3 Rep. 26; Whelpdale's Case, 5 Rep. 119; Melvin *v.* Proper's, etc., 16 Pick. 167; Foley *v.* Howard, 8 Clarke, 36. But Lord Coke maintained that the husband's assent did not prevent a disclaimer by the wife after his death. Co. Lit. 3a.

[2] Garforth *v.* Bradley, 2 Ves. 675; Richards *v.* Richards, 2 B. & Ad. 447; Howard *v.* Okes, 3 Wels., H. & G. 136; Legg *v.* Legg, 9 Mass. 99; Dean *v.* Richmond, 5 Pick. 461; Phillis Kirk *v.* Plackwell, 2 Maule & S. 399.

[3] McNeilage *v.* Holloway, 1 Barn. & Ald. 218.

[4] Richards *v.* Richards, 2 Barn & Ad. 447; Hart *v.* Stephens, 6 Q. B. 937; Scarpellini *v.* Atcheson, 7 Ad. & El. N. S. Q. B. 847; Gaters *v.* Madeley, 6 Mees. & W. 423; Tritt *v.* Colwell, 31 Pa. St. 228; Needles *v.* Needles, 7 Ohio St. 432.

[5] Connor *v.* Martin, 1 Strange, 516; Barlow *v.* Bishop, 3 Esp. 266; *s. c.* 1 East, 432; Cotes *v.* Davis, 1 Camp. 485; Rawlinson *v.* Stone, 5 Wilson, 5; Savage *v.* King, 17 Me. 301; Shuttleworth *v.* Noyes, 8 Mass. 229; Evans *v.* Secrest, 3 Ind. 545.

negotiate the paper himself, or hold it and demand payment when it falls due,[1] or he may sue upon it in the joint names of himself and wife.[2] He may also authorize her to indorse it, and her indorsement with his consent is as binding upon him, as if he had indorsed it himself.[3] But although the wife's indorsement of her bills and notes without the husband's consent is invalid for every purpose, so far as to affect the rights of herself or husband, and the husband may recover such a bill or note of the holder, yet if an innocent indorsee acquire possession of it, he may maintain an action on the bill or note, against the drawer, acceptor or maker, if the paper was executed after the marriage, on the ground that the maker or drawer is estopped from denying the capacity of the payee.[4] So, also, if the indorsee of the married woman himself indorses the instrument to another, his indorsement warrants the legality of the married woman's indorsement, and he is estopped from denying it.[5] If a promissory note or bill of exchange is made payable to a husband and wife jointly, they acquire a joint interest, something like the estate in entirety in the law of real property.[6] During marriage payment is made to the husband, but if it should remain unpaid at his death, it passes to the wife as survivor, and the husband's personal

[1] Burrough *v.* Moss, 10 B. & C. 558; Mason *v.* Morgan, 2 Ad. & El. 30; Gaters *v.* Madeley, 6 Mees. & W. 423; McNeilage *v.* Holloway, 1 Barn & Ad. 218; Sutton *v.* Warren, 10 Met. 451.

[2] Richards *v.* Richards, 2 Barn. & Ad. 447.

[3] Stevens *v.* Beal, 10 Cush. 291; Roland *v.* Logan, 18 Ala. 307; Menkins *v.* Heringhi, 17 Mo. 297.

[4] Smith *v.* Marsack, 6 C. B. 486; Drayton *v.* Dale, 2 Barn. & C. 293; Rawlinson *v.* Stone, 3 Wils. 1, 5. But if the paper was executed before the marriage, even the innocent indorsee acquires nothing by the unauthorized indorsement of a married woman. Connor *v.* Martin, 1 Strange, 516; Rawlinson *v.* Stone, 3 Wils. 1, 5.

[5] Prescott Bank *v.* Caverly, 7 Gray, 217.

[6] See Tiedeman on Real Property, § 242.

representatives can make no claim to any part of it.[1] The wife's legal personality is so completely absorbed in that of the husband, that they cannot at common law contract with each other. It is therefore held that a note or bill drawn by the husband in favor of his wife is absolutely void, and she cannot maintain any action upon it, even against his executors after his death;[2] except where the note or bill represents money paid to him out of her separate estate, when it will be enforcible in equity against his estate as a trust.[3]

§ 64. **Reduction of wife's choses in action to possession.** — The husband does not acquire the title to the wife's *choses in action* merely by his marriage to her He must first reduce them to his possession. If he dies without having done so, the *choses in action* at his death again become the absolute property of the widow, and do not pass to his personal representatives.[4] So, also, at common law, since the husband was entitled to be her administrator, and the English statute of distribution did not provide for the distribution of the wife's personal property, the husband could claim in his representative capacity all the *choses in action* which he had failed to reduce to possession during her life.[5] It has also been held that if the husband after his wife's death gets possession of her *choses in action*, he

[1] Draper *v.* Jackson, 16 Mass. 480; Richardson *v.* Daggett, 4 Vt. 336; Borst *v.* Spellman, 4 N. Y. 284; Sanford *v.* Sanford, 45 N. Y. 723; Allen *v.* Tate, 58 Miss. 588.

[2] Gay *v.* Kingsley, 11 Allen, 345; Jackson *v.* Larks, 10 Cush. 550; Sweat *v.* Hall, 8 Vt. 187.

[3] Murray *v.* Glasse, 23 L. J. Ch. 126; McCampbell *v.* McCampbell, 2 Lea, 661.

[4] Draper *v.* Jackson, 16 Mass. 480; Hayward *v.* Hayward, 20 Pick. 517; Vance *v.* McLaughlin, 8 Gratt. 289; May *v.* Boisseau, 12 Leigh, 521; Gaters *v.* Madeley, 6 Mees. & W. 423; Richards *v.* Richards, 2 B. & Ad. 447; Philliskirk *v.* Pluckwell, 2 Maule & S. 393.

[5] Betts *v.* Kimpton, 2 Barn. & Ad. 273; 1 Parsons' N. & B. 85.

is entitled to them, although he has not taken out letters of administration.[1]

But the distribution of a married woman's estate is now regulated by statute in all of the American States; and if a husband has failed to reduce the wife's *choses in action* to possession during her life, he can after her death only claim the share in them which the statute of distribution gives him. It is also important to know what acts on the part of the husband will amount to a reduction to possession. Of course, negotiation of her bills and notes or collection of them, would be a reduction to possession if he applied the proceeds to his own use.[2] Ordinarily any act, indicating the purpose to apply to his own use his wife's *choses in action* will be a sufficient reduction to possession.[3] But the mere custody of the property, or the intention to appropriate without the act, will not be sufficient.[4]

§ 65. **The bankrupt or insolvent payee.** — When an insolvent person goes into bankruptcy, all his property passes to his assignee, and, of course, his bills and notes receivable are thereafter only collectible by his assignee. Any attempted indorsement by him of a bill or note after bank-

[1] Whitaker *v.* Whitaker, 6 Johns. 112; Revel *v.* Revel, 2 Dev. & Bat. 272; Lee *v.* Wheeler, 4 Ga. 541.

[2] Oglander *v.* Baston, 1 Vern. 396; *s. c.* 2 Ves. sr. 677; Scarpellini *v.* Atcheson, 7 Q. B. (53 E. C. L. R.) 864; Tuttle *v.* Fowler, 22 Conn. 58; 1 Parsons' N. & B. 86. But payment of interest or part of principal to the husband would be only a reduction *pro tanto*, Nash *v.* Nash, 2 Mad. 133; Hart *v.* Stephens, 6 Q. B. 937; and where the proceeds of the payment in full are held for the benefit of the wife, it will not be considered a reduction to possession, Stanwood *v.* Stanwood, 17 Mass. 57. An assignment of them under the insolvent laws has also been held to be effective reduction to possession. Glasgow *v.* Sands, 3 Gill & J. 96; Richwine *v.* Heim, 1 Penn. 373.

[3] 1 Parsons' N. B. 86; 1 Daniel's Negot. Inst., § 257.

[4] Holmes *v.* Holmes, 28 Vt. 765; Blount *v.* Bestland, 5 Ves. jr. 515. See Schouler's Dom. Rel. 119.

ruptcy will be void.[1] But if he sold the paper before his bankruptcy, the title of the purchaser will be good against the assignee, although the indorsement was made after bankruptcy.[2] If, however, one should make a bill or note payable to a bankrupt, he cannot deny his capacity to make a legal indorsement, and the indorsee can sue upon the instrument.[3]

§ 66. **Alien enemies as parties to commercial paper.** — The fact that one of the parties to a commercial paper is an alien does not affect its validity. But if he is an alien enemy by the common international law of the civilized world, the paper is declared to be absolutely void. All bills of exchange, and promissory notes, negotiated between persons, whose countries are then at war with each other, are void, and cannot be enforced after termination of hostilities.[4] The reason for this rule as stated by Mr. Daniel,[5] is, that "the hostile countries become sealed as against each other; and both for the purpose of identifying the citizen thoroughly and emphatically with the policy and interests

[1] 1 Daniel's Negot. Inst., § 260; 1 Parsons' N. & B. 153.

[2] Smith *v.* Pickering, Peake, 50; Watkins *v.* Maule, 2 Jac. & W. 237; Hersey *v.* Elliott, 67 Me. 527; Hughes *v.* Nelson, 28 N. J. Eq. 549.

[3] Dayton *v.* Dale, 2 B. & C. 293.

[4] Willison *v.* Patterson, 7 Taunt. 439; *s. c.* 1 Moore, 133. This rule was applied in numerous cases to commercial paper negotiated between citizens of the United States and of the Confederate States, during the great American civil war. The Venice, 2 Wall. 258; The Hampton, 5 Wall. 372; The William Bagaley, 5 Wall. 377; Hanger *v.* Abbott, 6 Wall. 532; Ward *v.* Smith, 7 Wall. 447; The Prize Cases, 2 Black, 635; Woods *v.* Wilder, 43 N. Y. 164; Billgery *v.* Branch, 19 Gratt. 393; Moon *v.* Foster, cited in 19 Gratt. 433; *s. c.* Chase's Decisions, 222; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 785; Tarleton *v.* Southern Bank, 49 Ala. 229. But it seems that if a citizen of one country draws in favor of his own government on the citizen of a country at war with his own, it is a valid bill of exchange. United States *v.* Barker, 1 Paine C. C. 156; Haggard *v.* Conkwright, 7 Bush, 16.

[5] 1 Daniel's Negot. Inst., § 216.

of his country, and of preventing communications to the enemy, which might be damaging in their character, the law of nations absolutely prohibits all intercourse between the citizens of belligerent countries, and pronounces all contracts between them utterly void."[1] The rule not only applies to citizens of belligerent countries, but also to alien residents.[2] The rule does not apply to neutrals, so that the citizen of one belligerent country may draw on the citizen of another in favor of a neutral, and the bill will be valid.[3] So, also, is it permissible for a prisoner of war to draw a bill of exchange on a citizen of his own country, to pay for necessaries, or for the ransom of a captured ship, or the repair of one protected by cartel between the combatants.[4] But, with these exceptions, the rule is strictly enforced in all civilized countries.

[1] Griswold *v.* Waddington, 16 Johns. 438; The Julia, 8 Cranch, 131; Wheaton's International Law; 1 Parsons' N. & B. 152; 1 Kent Com. 67.

[2] McConnell *v.* Hector, 3 Bos. & P. 707; Roberts *v.* Hardy, 3 Maule & S. 533.

[3] 1 Daniel's Negot. Inst., § 220; Story on Bills, §§ 103, 104.

[4] Danbuz *v.* Morhead, 6 Taunt. 332; Cornu *v.* Blackburn, 2 Doug. 641; Ricord *v.* Bettenheny, 3 Burr. 1734; Yates *v.* Hall, 1 T. R. 73; Lackley *v.* Farse, 15 Johns. 338; Patts *v.* Bell, 8 T. R. 548.

CHAPTER V.

THE LAW OF AGENCY IN ITS APPLICATION TO COMMERCIAL PAPER.

SECTION 72. The general principle of agency.
73. Capacity of persons to become agents.
74. Married women as agents of husbands.
75. The manner of creating the agency — Express authority.
76. Implied authority of agents.
77. Authority implied from express authorities.
78. Authority implied from appointment to a particular clerkship or office.
79. Authority implied from previous recognitions or ratifications of agency.
80. Revocation of authority — Presumed continuance of authority.
81. Effect of special instructions upon general authority.
81*a*. Signature by procuration.
82. Implied limitation of agent's authority to act for the benefit of principal.
83. Ratification of unauthorized acts.
84. Liability of agent for unauthorized acts.
85. Form of signature by the agent.
86. Exceptions to the liability of agents.
87. Liability of principal on commercial paper executed in the agent's name.
88. Action by principal on commercial paper made payable to his agent.
89. Agent cannot delegate his authority.

§ 72. **The general principle of agency.** — The affairs of life become so complicated, that it often becomes impossible for one to attend to all of his business personally, and he is required to employ agents to do it for him. In recognizing this practical need of agents in the prosecution of almost every kind of business, the law concedes to every man the power to act through his agents to the same extent

that he can himself; and lays down the broad rule of liability, *qui facit per alium, facit per se.* It is therefore not necessary for one to execute his own contracts; he may employ an agent to execute them for him, and they will be as binding upon him as if he had executed them himself. So may one authorize another to make, draw, accept and indorse commercial paper for him. There are but three requirements to be complied with, in order that the acts of the agent may be lawfully imputed to the principal, viz.: *First*, that the principal himself was competent to make contracts, and hence to employ an agent; *secondly*, that the agent was competent to act as such; and *thirdly*, that he was authorized to do the particular thing which he did. The first requirement has been already fully considered in the preceding chapter, in which was discussed the capacity of parties to commercial paper.

§ 73. **Capacity of persons to become agents.** — The law does not require the same degree of mental ability or capacity to be an agent, as to be a principal. Indeed, there is very little legal restriction upon the power to be agents. For while insane persons, infants, married women, aliens and the like are incapacitated from making contracts for themselves, they may act to the fullest extent as agents of others.[1] It is doubtful whether an infant of such tender years, or a lunatic suffering from so great a dementia that he could not understand the nature of the business he was to transact, could be a lawful agent.[2] But I imagine that the mental incapacity in such a case would simply make it an impossibility for the agent to attend to the business. But, as long as the incapacity was

[1] 1 Daniel's Negot. Inst., § 272. During the existence of slavery, slaves were frequently employed as agents, although held incapable of making contracts for themselves. The Governor *v.* Dailey, 14 Ala. 469.

[2] 1 Daniel's Negot. Inst., § 272.

not so complete, no valid objection could be raised to his acting as the agent in making contracts, or in doing anything else, the doing of which will not prove injurious to or dangerous to any one but the principal.

§ 74. **Married women as agents of husbands.** — Although married women were at common law prohibited from making any kind of contract with anybody, and most especially with her husband, she can be the agent of her husband to the fullest extent of his power to contract.[1] She may with his consent make and execute all kinds of commercial paper. But, of course, her authority to act for him must be proved to have been given her expressly, or implied from allowing her to make purchases on his credit.[2] Every husband is obliged by law to furnish his wife with the necessaries of life; and if he fails to do so, she is authorized by the law to purchase them on his credit.[3] There cannot be much doubt that if she gives a note for these purchases, in her husband's name, he could be held liable on it. When the husband adopts, as he may do, his wife's name in his business, notes and bills, executed or indorsed in her name, whether by himself or by her, will be as binding upon him as if they were executed or indorsed in his own name.[4] And a note or bill executed in her name without authority, may be subsequently ratified by him.[5]

[1] 1 Black. Com. 442; Coldstone *v.* Toney, 6 Bing. N. C. 98; Hopkins *v.* Mollineux, 4 Wend. 465; Singleton *v.* Mann, 3 Mo. 464; Engman *v* Immel, 59 Wis. 249.

[2] Smith *v.* Pedley, Chitty, Jr., on Bills, 1241; Reakert *v.* Sanford, 5 Watts & S. 164.

[3] 1 Bishop Mar. & Div., §§ 553, 555, 565, 568 *et seq.*, 578; Schouler's Dom. Rel. 76–79, 85; Mudge *v.* Bullock, 83 Ill. 22.

[4] Prestwick *v.* Marshall, 7 Bing. 565; Cotes *v.* Davis, 1 Camp. 485; Hancock Bk. *v.* Joy, 41 Me. 568; Abbott *v.* McKinley, 2 Miles, 220; Menkins *v.* Heringhi, 17 Mo. 297. See Miller *v.* Delamater, 12 Wend. 433.

[5] Cotes *v.* Davis, 1 Camp. 485; Linders *v.* Bradwell, 5 C. B. 583; Shaw *v.* Emery, 38 Me. 484; Mudge *v.* Bullock, 83 Ill. 23.

But, unless he has authorized or ratified her use of her own name in executing notes and bills as his agent, she must sign her husband's name.[1]

§ 75. **The manner of creating the agency — Express authority.** — Agencies are created either by express or implied authority, or by subsequent ratification. When the authority is express, there is no special form to be observed in the grant of it. As a general rule, it need not be in writing, even though the statute of frauds may require the contract, which the agent is to execute, to be in writing.[2] But if the agent is to execute a deed of conveyance, or any other instrument under seal, the authority must be under seal, the rule of the common law being that the power of attorney, or authorization, must be by a writing of as high a character as that which is to be executed.[3] Therefore, a verbal authority to sign a commercial paper for another is sufficient.[4] But while a verbal authority is sufficient, if a written authority is given, as a matter of caution, the terms of the agency, and the scope of the

[1] Minard *v.* Mead, 7 Wend. 68; Abbott *v.* McKinley, 2 Miles, 220.

[2] Emerson *v.* Providence Hat Man'f'g Co., 12 Mass. 237; Shaw *v.* Mudd, 8 Pick. 9; Miles *v.* Cook, 1 Grant (Pa.) 58; Small *v.* Owings, 1 Md. Ch. 363; Yerby *v.* Griggsby, 9 Leigh, 387; Barker *v.* Garvey, 83 Ill. 184; Long *v.* Hartwell, 5 Vroom, 116; Challoner *v.* Bouck, 56 Wis. 652; Deverell *v.* Bolton, 18 Ves. 505; Rucker *v.* Commeyer, 1 Esp. 105.

[3] Wheeler *v.* Nevins, 34 Me. 54; Gage *v.* Gage, 10 Fost. (N. H.) 420; Blood *v.* Goodrich, 9 Wend. 68; Elliott *v.* Stocks, 67 Ala. 336; Harshaw *v.* McKesson, 65 N. C. 688; McMurtry *v.* Brown, 6 Neb. 368; Rowe *v.* Ware, 30 Ga. 278; Smith *v.* Dickinson, 6 Humph. 261; Maus *v.* Worthing, 3 Scam. 26; Tappan *v.* Redfield, 1 Halst. Ch. 339; Rhode *v.* Louthaine, 8 Blackf. 413; Spurr *v.* Trimble, 1 A. K. Marsh. 278; McMurtry *v.* Frank, 4 T. B. Mon. 39; Mitchell *v.* Sproul, 5 J. J. Marsh. 264; Cooper *v.* Rankin, 5 Binn. 613; Gordon *v.* Bulkley, 14 S. & R. 331; Banorgee *v.* Hovey, 5 Mass. 11; Shuetze *v.* Bailey, 40 Mo. 69; St. Butterfield *v.* Beal, 3 Ind. 203; Kime *v.* Brooks, 9 Ired. 218; Smith *v.* Perry, 5 Dutch. 74.

[4] Daniel's Negot. Inst., § 274; 1 Parsons' N. & B. 91. But it was once held that a formal authority was required for this purpose. See Mann *v.* King, 6 Munf. 428.

agent's authority, are governed by the written authority. Parol evidence is inadmissible to control them.[1]

§ 76. **Implied authority of agents.** — The authority of agents may also rest upon implication, and there may be three kinds of implied authority: *First*, implied from express authorities; *second*, from appointment to a particular office or clerkship by name; and *third*, implied from previous ratifications or recognition of the agency.

§ 77. **Authority implied from express authorities.** — We have this general rule that applies to all cases of implied agencies, that no authority will be implied from an express authority, unless it is positively needful for the performance of the main duties contemplated by the express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers, will be conceded to the agent by implication.[2] In order, therefore, that the authority to make or draw, accept and indorse, commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. And the execution and negotiation of commercial paper are considered by the commercial world so liable to the infliction of injury on the principals, if this authority is given to

[1] 1 Daniel's Negot. Inst., § 274.

[2] Gerish *v.* Maher, 70 Ill. 470; Taylor *v.* Chicago, etc., R. R. Co., 74 Ill. 86; Reynolds *v.* Ferree, 86 Ill. 570; Smith *v.* Kidd, 68 N. Y. 130; Covill *v.* Hill, 4 Denio, 323; Case *v.* Jennings, 17 Texas, 661; Rhine *v.* Blake, 59 Texas, 240; Doubleday *v.* Kress, 50 N. Y. 410; Smith *v.* Johnson, 71 Mo. 382; Barns *v.* Hannibal, 71 Mo. 449; Star Line *v.* Van Vliet, 43 Mich. 364; Bentley *v.* Daggett, 51 Wis. 224; Shackman *v.* Little, 87 Ind. 181; Huntly *v.* Mathias, 90 N. C. 101; Levi *v.* Booth, 58 Md. 305; Holbrook *v.* Oberne, 56 Iowa, 324; Valentine *v.* Piper, 22 Pick. 85; Heath Nutter, 50 Me. 378; Stanwood *v.* Laughlin, 73 Me. 112; Taylor *v.* Starkey, 59 N. H. 142; Borel *v.* Rollins, 30 Cal. 408; Haydock *v.* Stow, 40 N. Y. 363.

agents, — the general custom being to reserve this power for personal exercise, — that the presumption of the law is more strongly opposed to an implied authority to execute and negotiate commercial paper than to do anything else. Hence, in this connection, the rule is strictly enforced, that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is *absolutely* necessary to the exercise of the express authority. In the note will be found a number of cases in which it has been held that there was no implied authority to make, accept or indorse commercial paper.[1] And even where there is a general authority "to transact all business," or "to do all lawful acts concerning all the principal's business of what nature or kind soever,' it is very generally held that the power to execute or negotiate bills and notes is not included.[2] This is particularly true where this general grant of authority follows specific grants of authority. In these cases, the ordinary rule of construction would apply, and only those powers would be implied in this general grant, which are necessary or supplementary to the specific powers previously granted.[3] But where the authority is to sign the name of the principal

[1] The authority to execute or negotiate commercial paper cannot be implied from an authority to make purchases and pay for them. Taber *v.* Cannon, 8 Met. 456; Brown *v.* Parker, 7 Allen, 339; Gould *v.* Norfolk Lead Co., 9 Cush. 338; or to buy and sell goods, Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237; or from authority to advance money, Webber *v.* Williams' College, 23 Pick. 302.

[2] Sewanee Mining Co. *v.* McCall, 3 Head, 619; Hogg *v.* Smith, 1 Taunt. 347; Hay *v.* Goldsmidt, 2 J. P. Smith, 79; Thompson *v.* Bk. of British N. Am., 82 N. Y. 1; Robinson Chemical Nat. Bk., 86 N. Y. 407; Kilgour *v.* Finlyson, 1 H. Bl. 155; Esdaille *v.* La Nanze, 1 Younge & C. 394; Rossiter *v.* Rossiter, 8 Wend. 494. But see, *contra*, Bailey *v.* Rawley, 1 Swan, 205; Frost *v.* Wood, 2 Conn. 23.

[3] Rossiter *v.* Rossiter, 8 Wend. 494; Hay *v.* Goldsmidt, 2 J. P. Smith, 79; Hogg *v.* Smith, 1 Taunt. 347; Esdaille *v.* La Nanze, 1 Younge & C 347

whenever requisite or expedient, the power to draw bills of exchange or make promissory notes will be included.[1]

Not only will the authority to execute or negotiate bills and notes, as agent, not be implied from the express authority to do other acts, foreign to commercial paper, unless this authority is necessary to the complete exercise of the express authority; but so, also, will the courts refuse to imply the power to make a note from the authority to draw a bill, or the power to indorse or accept a bill from the power to draw one. Each one of these powers may be granted separately, and each may be exercised independently of the possession of the others.[2] So, also, will the authority to execute a note, not include the power to renew;[3] and where the power to execute a note or draw a bill is coupled with certain conditions, the conditions must be complied with. Thus, the authority to sign and negotiate paper payable at a particular bank does not include an authority to negotiate at any other bank;[4] nor can the agent deviate from the instructions concerning the time when the paper shall become due and payable.[5] Nor can the agent make a note payable to a different payee than the one specified, although the proceeds are devoted to the same purpose.[6]

[1] Dollfus *v.* Frosch, 1 Denio, 368.

[2] Robinson *v.* Yarrow, 7 Taunt. 455; Attwood *v.* Munnings, 7 B. & C. 278; Murray *v.* East India Co., 5 B. & Ald. 204; Bank of Deer Lodge *v.* Hope Mining Co., 3 Montana, 146; Cuyler *v.* Merrifield, 12 N. Y. S. C. (5 Hun) 559; School District *v.* Sipley, 54 Ill. 284; Sewanee Mining Co. *v.* McCall, 3 Head, 621; Prescott *v.* Flinn, 9 Bing. 19.

[3] Ward *v.* Bk. of Kentucky, 7 Mon. 93.

[4] Craighead *v.* Peterson, 72 N. Y. 279; Morrison *v.* Taylor, 6 Mon. 82.

[5] Batley *v.* Carswell, 2 Johns. 48. But if the deviation is not material, as where the authority is to renew a note at sixty or ninety days, it will be held to be a good execution to renew at eighty days. Bk. of So. Car. *v.* McWillie, 4 McCord, 438. See also Adams *v.* Flanagan, 35 Vt. 410.

[6] Horton *v.* Townes, 6 Leigh, 59.

The authority to sell a note does not necessarily imply the authority to guarantee its payment, for one may be an agent to sell, without the power of indorsement.[1] So, also, the power to collect does not imply the power to indorse and transfer a note or bill.[2]

§ 78. **Authority implied from appointment to a particular clerkship or office.** — Where one is appointed to an office or clerkship, one of whose customary duties is to execute and negotiate bills and notes in the name of the principal, the authority need not be expressly given. It will be implied from the appointment. Thus, an appointment as cashier of a banking house or business concern implies the grant of an authority to execute and negotiate bills and notes.[3] But this power does not fall within the scope of authority of the ordinary clerks and salesmen.[4]

§ 78a. **The authority of joint agents and of the agent of joint principals.** — If two or more persons are authorized to act as the agents of another, they are required to act jointly in order to bind their principal, unless they are

[1] Brown *v.* Donnell, 49 Me. 421; Feun *v.* Harrison, 3 T. R. 757; Graul *v.* Strutzel, 53 Iowa, 712.

[2] Goodfellow *v.* Landis, 36 Mo. 168; Smith *v.* Johnson, 71 Mo. 382; Ryhiner *v.* Feickhert, 92 Ill. 305; Hogg *v.* Snaith, 1 Taunt. 347; Graham *v.* U. S. Sav. Inst., 46 Mo. 187; Russell *v.* Drummond, 6 Ind. 216 (sent to an attorney at law for collection).

[3] Edwards *v.* Thomas, 66 Mo. 482; Morse *v.* Mass. Nat. Bk., 1 Holmes C. C. 209. See Sturges *v.* Bk. of Circleville, 11 Ohio St. 153; Wild *v.* Bk. of Passamaquoddy, 3 Mason, 505; Minor *v.* Mechanics' Bk. of Alexandria, 1 Pet. 46; United States *v.* City Bank of Columbus, 21 How. 356; Baldwin *v.* Bank of Newbury, 1 Wall. 234; Badger *v.* Bk. of Cumberland, 26 Me. 428; Bank of Pennsylvania *v.* Reed, 1 Watts & S. 101.

[4] Terry *v.* Fargo, 10 Johns. 114; Paige *v.* Stone, 10 Met. 160; Smith *v.* Gibson, 6 Blackf. 369; Davidson *v.* Stanley, 2 Man. & G. 121; masters of vessels and supercargoes do not possess this implied authority, Scott *v.* McLellan, 2 Greenl. 199; Bowen *v.* Stoddard, 10 Met. 375; May *v.* Kelly, 27 Ala. 497.

expressly authorized to act severally. In the absence of express authority, the act of one agent will not bind the principal. It has thus been held that where one authorizes two persons by name to use his name as indorser on negotiable paper, the indorsement of his name by one agent without the co-operation of the other will not be binding upon the principal, for he only authorized an indorsement by the two acting jointly.[1] On the other hand, if two or more persons authorize an agent to act for them jointly, as where they authorize the agent to sign their names as indorsers to certain bills and notes, the agent has power to bind them as joint indorsers. And it was held that he had exceeded his authority when he signed their names to an instrument as successive indorsers, the liability being in that case relatively different from the liability of joint indorsers.[2] But it is also a rule of law, that where one authorizes another to sign his name to commercial paper, it is an authority to assume a several liability in the name of the principal; and if the agent undertakes to bind him jointly with another, the act is not binding upon the principal.[3]

§ 79. **Authority implied from previous recognitions or ratifications of agency.** — If a person has, in the capacity of an agent for another, repeatedly drawn or accepted bills, or executed promissory notes for him, whether with or without authority, and the supposed principal has recognized or ratified the act of the agent, by payment of the bill or note, or in any other way; the principal will be bound by any subsequent exercise of authority of a like character, on the ground of estoppel. By allowing the

[1] Union Bk. *v.* Beirne, 1 Gratt. 226; Hartford Fire Ins. Co. *v.* Wilcox, 57 Ill. 180.

[2] Bank of U. S. *v.* Beirne, 1 Gratt. 234.

Stainback *v.* Reed, 11 Gratt. 281; Bryan *v.* Berry, 6 Cal. 394.

person to appear as a duly authorized agent, in honoring the bills and notes previously executed by him as agent, he is estopped from denying the authority of the agent as against persons who deal with the agent in reliance upon this evidence of authority.[1] But it is only when the person dealing with the agent relies upon the previous ratified assumptions of authority as evidence of an existing authority, that he can hold the principal liable on an unauthorized act. If, therefore, the bill of exchange or promissory note was not taken on the faith of these similar transactions, as where the person taking them either knew that the previous transactions were unauthorized, or did not know of them at all when he took the paper, and only discovered them afterwards, the principal is not estopped from showing that he had not authorized the transaction.[2]

§ 80. **Revocation of authority — Presumed continuance of authority.** — When an authorized agency is limited in point of time, as, for example, when an employer in his absence authorized an agent to execute and negotiate commercial paper during a certain time, at the expiration of that time his authority to so represent his employer comes to an end without any formal or informal act of revocation; and any subsequent attempt of the agent to execute such paper in the name of the principal will not bind the latter.[3] But when a general authority, unlimited in point of time, is given to an agent to sign the principal's name to

[1] Prescott *v.* Flinn, 2 Moore & S. 18 (9 Bing. 19); Barber *v.* Gingell, 3 Esp. 60; Haughton *v.* Ewbank, 4 Camp. 188; Neal *v.* Irving, 1 Esp. 61; Abeel *v.* Seymour, 13 N. Y. S. C. (6 Hun) 656; Stroh *v.* Hinchman, 37 Mich. 490.

[2] Cash *v.* Taylor, 8 Law J. 262, cited in Chitty on Bills (13 Am. ed.) 41; St. John *v.* Redmond, 9 Port. 428; 1 Daniel's Negot. Inst., § 297; 1 Parsons N. & B. 92.

[3] Manufacturers Nat. Bk. *v.* Barnes, 65 Ill. 69. See Weiser *v.* Denison, 10 N. Y. 68.

commercial paper, then the authority continues until it is revoked. The principal ordinarily has the power to discharge the agent or revoke his authority at any time. This is so, even though the agency is expressly declared to be irrevocable.[1] The only exception to the right of revocation is in the cases where the agent's authority is coupled with an interest of his own in the exercise of the authority; as, for example, when a bill of exchange or promissory note, or any other commercial paper, is pledged by the holder as collateral security for his debt. In such a case the authority of the pledgee to sell the thing pledged could not be revoked, until the pledge is released by the payment of the debt.[2]

The death of either party operates *ipso facto* as a revocation of the agency,[3] and the exercise of the authority by the agent after the death of the principal will be void, even though neither the agent nor the person dealing with him knew of his death.[4] Where the authority or power

[1] MacGregor *v.* Gardner, 14 Iowa, 326; Smart *v.* Sandars, 3 C. B. 380; Blackstone *v.* Buttermore, 3 Smith (Pa.) 266; Brookshire *v.* Voncannon, 6 Ired. 231; Brookshire *v.* Brookshire, 8 Ired. 74; Phillips *v.* Howell, 60 Ga. 411; Trumbull *v.* Nicholson, 27 Ill. 149.

[2] Hunt *v.* Rousmanier, 8 Wheat. 174; Walsh *v.* Whitcomb, 2 Esp. 565; Wheeler *v.* Knaggs, 8 Ohio, 169; Varnum *v.* Meserve, 8 Allen, 158; Daugherty *v.* Moon, 59 Tex. 397; Marzion *v.* Pische, 8 Cal. 522; Watson *v.* King, 4 Camp. 272; Whitehead *v.* Lord, 7 Exch. 691; Hynson *v.* Noland, 14 Ark. 710; Hartley's Appeal, 3 Smith (Pa.) 212; Blackstone *v.* Buttermore, 3 Smith (Pa.) 266; Smart *v.* Sandars, 3 C. B. 380; Hutchins *v.* Hebbard, 34 N. Y. 24; Bonney *v.* Smith, 17 Ill. 531; Barr *v.* Schroeder, 32 Cal. 609; Posten *v.* Rassette, 5 Cal. 467; Chambers *v.* Seay, 73 Ala. 372.

[3] Boone *v.* Clark, 3 Cranch C. C. 389; Gale *v.* Tappan, 12 N. H. 145; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Scruggs *v.* Driver, 31 Ala. 274; Saltmarsh *v.* Smith, 32 Ala. 404; Lehigh Coal, etc., Co. *v.* Mohr, 2 Norris (Pa.) 228; Amore *v.* La Motte, 5 Abb. N. C. 146; McDonald *v.* Black, 20 Ohio, 185; Turnan *v.* Temke, 84 Ill. 286: Darr *v.* Darr, 59 Iowa, 81.

[4] Galt *v.* Galloway, 4 Pet. 332, 344; Blades *v.* Free, 9 B. & C. 167; Smout *v.* Ilbery, 10 M. & W. 1; Bank of Washington *v.* Peirson, 2 Cranch C. C. 685; Wilson *v.* Edmonds, 4 Fost. (N. H.) 517; Davis *v.* Windsor Savings Bk., 46 Vt. 728; Perries *v.* Aycinena, 3 Watts & S. 64; Travers

is coupled with an interest, it seems, nevertheless, that death will work a revocation of it, if the agent can only exercise the power in the name of the dead principal; for, to employ the language of Lord Ellenborough, "How can a valid act be done in the name of a dead man?" [1] But where the authority can be exercised in the name of the agent, as in the case of a pledge, the authority will not be revoked by the death of the principal.[2]

Insanity of agent also puts an end to the agency, where it is sufficient to affect his legal capacity; and where the principal is insane, the authority of the agent is revoked, certainly where the person dealing with him knows of the insanity of the principal.[3] But where the agency is coupled with an interest,[4] or where the insanity was very slight or unknown to persons dealing with the agent,[5] the agency is held very generally to continue.

As has already been explained,[6] a war between two countries suspends the contracting power of the citizens of those countries with each other. But if a foreigner should have an agent in this country, with the authority to execute, negotiate and honor commercial paper in his name, the breaking out of war between the two countries would not revoke this agency, except so far as the exercise of the authority would require communications with, or remittances to or from, the alien principal. The agent can still represent his alien principal in all transactions taking place

v. Crane, 15 Cal. 12; Cleveland *v.* Williams, 29 Tex. 204; Lewis *v.* Kerr, 17 Iowa, 73.

[1] Watson *v.* King, 4 Camp. 272, 274; Clayton *v.* Merrett, 52 Miss. 353.

[2] Moore *v.* Hall, 48 Mich. 143; Bennett *v.* Stoddard, 58 Iowa, 654.

[3] Drew *v.* Munn, 4 Q. B. D. 661; Davis *v.* Lane, 10 N. H. 156; Hill *v.* Day, 7 Stew. Ch. 150.

[4] Haggart *v.* Ranger, 15 Fed. Rep. 860; Hill *v.* Day, 7 Stew. Ch. 150.

[5] Hill *v.* Day, 7 Stew. Ch. 150; Drew *v.* Nunn, 4 Q. B. D. 661.

[6] See *ante*, § 66.

and being completed within the limits of this country.[1] But it seems that the agency must have been created before the commencement of hostilities.[2] Except where the revocation is effected by the death of the principal, it is not sufficient, in order to revoke the authority and free himself from responsibility for the subsequent acts of the agent, that the principal notify the agent of the revocation. One having dealings with the agent has a right to presume that the general authority of the agent continues, until a notice of revocation is sent to him or published to the world at large. Therefore, an agent who has been authorized to execute and negotiate or indorse commercial paper in the name of his principal, can still bind his principal after a revocation of his authority, as long as due notice of the revocation has not been given to the public.[3]

§ 81. **Effect of special instructions upon general authority.**— Where an agent, such as the cashier of a banking house, is authorized by commercial custom to make or draw, accept and indorse, commercial paper, he will be able to bind his principal by such acts, even though they are in violation of the express instructions given him. The instructions will not limit the authority of the agent, as against

[1] Ward *v.* Smith, 7 Wall. 447; Clarke *v.* Morey, 10 Johns. 70; Hubbard *v.* Matthews, 54 N. Y. 48; Manhattan Ins. Co. *v.* Warwick, 20 Gratt. 614; Hale *v.* Wall. 22 Gratt. 424; Dennistown *v.* Imbrie, Wash. C. C. 399; Fisher *v.* Krutz, 9 Kan. 510; Moloney *v.* Stephens, 11 Heisk. 738; Monseaux *v.* Urquhart, 19 La. 485.

[2] United States *v.* Grossmayer, 9 Wall. 72; United States *v.* Lapine, 17 Wall. 602; Hubbard *v.* Matthews, 54 N. Y. 44; Small's Admr. *v.* Lumpkin, 28 Gratt. 835.

[3] 1 Daniel's Negot. Inst., § 288; Chitty on Bills (13 Am ed.), 42; Story on Agency, §§ 470, 473. See Munn *v.* Commission Co., 15 Johns. 44; Beard *v.* Kirk, 11 N. H. 397; Hancock *v.* Byrne, 5 Dana, 513; Longworth *v.* Conwell, 2 Blatchf. 469; Planters' Bk. *v.* Cameron, 3 Smed. & M. 609; Lamothe *v.* St. Louis Marine, etc., Co., 17 Mo. 204; Diversy *v.* Kellogg, 44 Ill. 114; Baltimore *v.* Eschbach, 18 Md. 276.

the third person dealing with him, unless this person has notice of these restrictive instructions.[1]

§ 81*a*. **Signature "by procuration."** — But where the agent signs his principal's name to commercial paper, and affixes the words "by procuration" notice is thus given to all subsequent holders of the paper that the agent is acting under special or written instructions; and the holder, who fails to make the proper inquiries in order to ascertain the limitations upon the general authority of the agent, acts at his peril, and cannot plead want of notice in his behalf, if it should appear that the agent had exceeded his authority.[2]

§ 82. **Implied limitation of agent's authority to act for the benefit of principal.** — It is implied in every agency, in the absence of express evidence to the contrary, that the power of the agent is to be exercised for the benefit of the principal, and not for his own private advantage. If an agent is authorized to make notes, or draw and accept bills of exchange, or indorse commercial paper generally, in the name of his principal, it is presumed that he can only do these things in behalf of his principal's interests; and if he should apply these notes and bills to his own use, with the knowledge of the payees and indorsees, the notes and bills will be void, and can not be enforced against the principal.[3] Nor can an agent, having the au-

[1] Fenn *v.* Harrison, 3 T. R. 757; Minor *v.* Mechanics' Bk. 1 Pet. 46, 70; Mt. Oliver Cemetery *v.* Shubert, 2 Head. 116; York Co. Bk. *v.* Stein 24 Md, 447; Pickering *v.* Busk, 15 East, 38; Whitehead *v.* Tucket, 15 East, 400; Williams *v.* Gety, 7 Casey (Pa.) 461.

[2] Alexander *v.* Mackenzie, 6 C. B. 766; Attwood *v.* Munnings, 7 B. & C. 278; North River Bank *v.* Aymar, 3 Hill, 262; Stainback *v.* Bk. of Va., 11 Gratt. 259; Stainback *v.* Read, 11 Gratt. 281.

[3] Truttell *v.* Brandon, 8 Taunt. 100; Haynes *v.* Foster, 2 C. & M. 237; First Nat. Bk. *v.* Gray, 63 Mo. 33; Stainback *v.* Bk. of Va., 11 Gratt. 269; Mechanics' Bk. *v.* Schaumberg, 38 Mo. 228.

thority to sign his principal's name to commercial paper, exercise his power for the accommodation of a third person,[1] unless he is expressly authorized to do so, or unless by previous acquiescence in such transactions the principal is estopped from denying the want of authority of his agent.[2] The fact, that the paper was issued by the agent without authority for the accommodation of himself or of a third person, will not avoid the paper in the hands of a *bona fide* holder.[3] But if an agent should in his own name draw a bill on his principal, and indorse it in his principal's name "per agent," it would be notice to all parties, into whose hands the bill may come, that it is accommodation paper, and therefore not binding upon the principal, unless expressly authorized.[4] Agents are generally disabled from making binding contracts with their principals, and hence it has been held that a note made by a corporation to its trustees or directors is against public policy and void.[5] It is also an implied limitation upon the power to draw bills in the principal's name, that he can only draw them against persons who are in debt to, or have funds of the principal.[6]

§ 83. **Ratification of unauthorized acts.**—Where one assumes without authority to act as the agent of another, the latter may ratify the act, and thus assume the liability for the transaction. But in order that one may by ratifica-

[1] North River Bk. *v.* Aymar, 3 Hill, 262; Wallace *v.* Branch Bk., 1 Ala. 565; Nichols *v.* State, 3 Yerg. 107.

[2] Commercial Bk. *v.* Norton, 1 Hill, 501; Valentine *v.* Packer, 5 Penn. 338.

[3] Edwards *v.* Thomas, 66 Mo. 469.

[4] See Stainback *v.* Bk. of Va., 11 Gratt. 281; Mechanics' Bk. *v.* Schaumburg, 38 Mo. 228; First Nat. Bk. *v.* Gay 63 Mo. 33; Treuttell *v.* Barnadon, 8 Taunt. 100.

[5] Wibur *v.* Lynde, 49 Cal. 290. See Chouteau *v.* Allen, 70 Mo. 338.

[6] Stainback *v.* Bk. of Va., 11 Gratt. 281, Chouteau *v.* Leech, 6 Harris (Pa.), 224; Pope *v* Albion Bk., 57 N. Y. 126; Wright *v.* Solomon, 19 Cal. 64.

tion be held liable for the transaction of an agent which he had not authorized, he must be capable of giving the authority.[1] Corporations, like natural persons, can ratify the unauthorized acts of its agents; but the rules and by-laws of the corporation must not in doing so be violated.[2] It is further necessary that when the alleged principal ratifies the act of the alleged agent, he should know all the facts of the case which are necessary to a full comprehension of his liability. A ratification, made when the principal was ignorant of any material fact, will not bind him.[3] But the ratification must be complete. A principal cannot ratify the unauthorized act of his agent in part, and reject the rest. He must either ratify or repudiate the whole transaction.[4] It is not necessary for the ratification to be formal or written. One may ratify by his acts and conduct, when they are only consistent with the presumption that he approves what the agent has done in his name.[5] Mere silence, unless accompanied by peculiar circumstances, will

[1] Bird *v.* Brown, 4 Exch. 786; Ainsworth *v.* Creke, L. R. 4 C. P. 483; Paul *v.* Berry, 78 Ill. 158; Darst *v.* Gale, 83 Ill. 137; Eadie *v.* Ashbaugh, 44 Iowa, 521.

[2] Supervisors *v.* Schenck, 5 Wall. 782; Knox Co. *v.* Aspinwall, 21 How, 544; Trundy *v.* Farrar, 32 Me. 225; Brady *v.* The Mayor, 16 How. Pr. 432; Peterson *v.* Mayor of N. Y. 17 N. Y. 453; Hoyt *v.* Thompson, 19 N. Y. 218; Johnson *v.* Stark Co., 24 Ill. 90; Keithsbury *v.* Frick, 34 Ill. 421; McCracken *v.* San Francisco, 16 Cal. 591; Zollman *v.* San Francisco, 20 Cal. 102.

[3] Supervisors *v.* Schenck, 5 Wall. 782; Creswell *v.* Lanahan, 101 U. S. 347; Nixon *v.* Palmer, 4 Seld. 398; School District *v.* Thompson, 5 Minn. 280; First National Bank *v.* Parsons, 19 Minn. 183; Benedict *v.* Minor, 58 Ill. 19; Eadie *v.* Ashbaugh, 44 Iowa, 521; Claflin *v.* Wilson, 51 Iowa, 15; Fletcher *v.* Dysart, 9 B. Mon. 413; Miller *v.* Board of Education, 44 Cal. 166.

[4] Benedict *v.* Smith, 10 Paige 127; Davenport Sav. Fund Assn. *v.* N. A. Fire Ins. Co., 16 Iowa, 74; Eadie *v.* Ashbaugh, 44 Iowa, 521; Henderson *v.* Cummings, 44 Cal. 325.

[5] Supervisors *v.* Schenck, 5 Wall. 782; Knox Co. *v.* Aspinwall, 21 How. 544; Bissel *v.* Jeffersonville, 24 How. 299; Moran *v.* Miami Co., 2 Blackf. 725.

not constitute a ratification;[1] but in any case the appropriation of the proceeds of the transaction by the principal, with a full knowledge of their source, as, for example, where the principal retains the things purchased by an agent, for which he gave a promissory note in the name of the principal, will operate as a binding ratification.[2]

§ 84. **Liability of agent for unauthorized acts.** — If an agent always guarantees that he has the authority to do what he undertakes in the name of another; and if, for example, he should sign another's name to a commercial paper without authority, he is responsible to the third persons who may be damaged by relying upon his implied representations; at least, if the facts, by which his authority is to be determined, are not equally within the knowledge of the persons dealing with him: in such cases, his guaranty of authority is absolute, and his own good faith and ignorance will not shield him from responsibility.[3]

[1] "There was no evidence of any assent given, or any actual ratification of the attorney by the principals, but the ratification is inferred from their silence. That is too equivocal a circumstance from which to form such a conclusion; and the subsequent conduct of the defendants in standing a suit shows that they did not understand their failure to object as an actual ratification." Hortons *v.* Townes, 6 Leigh, 47. But a long silence may, under peculiar circumstances, be held to operate as a ratification. See Wardrop *v.* Dunlop, 8 N. Y. S. C. (1 Hun) 325.

[2] Nat. Bk. *v.* Fassett, 42 Vt. 432; Ogden *v.* Marchand, 29 La. 61; Trustees of Schools *v.* McCormack, 41 Ill. 323; Farrar *v.* Peterson, 52 Iowa, 420.

[3] By some of the cases, he is held to be liable in tort, Smout *v.* Ilberry, 10 M. & W. 1, 9; Bartlett *v.* Tucker, 104 Mass. 334; Draper *v.* Mass., etc., Co., 5 Allen, 338; Abbey *v.* Chase, 6 Cush. 54; Eastwood *v.* Bain, 3 H. & N. 738; Lewis *v.* Nicholson, 18 Q. B. 503; Sheffield *v.* Larue, 16 Minn. 388; McHenry *v.* Duffield, 17 Blackf. 41; Randall *v.* Trimen, 18 C. B. 786; Ballou *v.* Talbot, 16 Mass. 461; Duncan *v.* Nelis, 32 Ill. 542; Johnson *v.* Smith, 21 Conn. 627; Jefts *v.* York, 4 Cush. 371; Teele *v.* Otis, 66 Me. 329; Taylor *v.* Shelton, 30 Conn. 122; Hall *v.* Crandall, 29 Cal. 572; Hopkins *v.* Mehaffy, 11 S. & R. 129; Delins *v.* Cawthorn, 2 Dev. 90; Bryson *v.* Lucas, 84 N. C. 680; Kroeger *v.* Pitcairn, 5 Out. (Pa.) 311

But if the facts are equally within the knowledge of all parties, and the agent acts ignorantly and in good faith, it has been held that the agent is not liable to third persons for exceeding his authority.[1]

§ 85. **Form of signature by the agent.**— When the agent signs a note or bill for his principal, he should write the name of his principal and then add his own as agent, viz.: A. (principal) by B. (agent). This is universally considered as the only truly correct form of signature.[2] But it is not absolutely necessary to the validity of the instrument, as the paper of the principal, that the signature should be in this exact form. Although it was once held to be ambiguous and doubtful,[3] it is now very generally held that the liability of the principal will attach to a paper which is signed by the agent "for" the principal, *i.e.* B. (agent) for A. (principal). Both names are upon the paper, and the intention of the agent to act only for and in the name of his principal would seem to be made clear enough by such a signature.[4]

According to many other cases, he may be held in an action on the commercial paper or other contract, the name of the principal being treated as surplusage. Weare *v.* Gove, 44 N. H. 196; Dusenbury *v.* Ellis, 3 Johns. Cas. 71; White *v.* Skinner, 13 Johns. 307; Rossiter *v.* Rossiter, 8 Wend. 494; Palmer *v.* Stephens, 1 Denio, 480; Sinclair *v.* Field, 8 Cow. 543 (but see White *v.* Madison, 26 N. Y. 116; Keener *v.* Harrod, 2 Md. 63; Byais *v.* Doore, 20 Mo. 284; Ormsby *v.* Kendall, 2 Ark. 338; Richie *v.* Bass, 15 La. Ann. 668; Dodd *v.* Bishop, 30 La. Ann. 1178.

[1] Polhill *v.* Walter, 3 B. & Ad. 114, 124; Jefts *v.* York, 10 Cush. 392; Whitney *v.* Wyman, 101 U. S. 392; Rathbon *v.* Budlong, 15 Johns. 1; Ogden *v.* Raymond, 22 Conn. 379; Seery *v.* Locks, 29 Ill. 313; Ware *v.* Morgan, 67 Ala. 461.

[2] Bradlee *v.* Boston Glass Co., 16 Pick. 348; Weaver *v.* Cornwall, 35 Ark. 198.

[3] Parsons' N. & B. 91.

[4] Long *v.* Colburn, 11 Mass. 97; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. 285; Bank of Genessee *v.* Patchin Bk., 9 N. Y. 315; Tiller *v.* Spradley, 39 Ga. 35; Raney *v.* Winter, 37 Ala. 277; Elwell *v.* Shaw, 16 Mass. 42; Brinley *v.* Mann, 2 Cush. 337; Mussey *v.* Scott, 7 Cush. 215:

Although it is advisable for the agent to affix his name to the signature, it is not at all necessary to the validity of the instrument. If the agent has the authority to sign his principal's name to a note or bill, he may sign it without affixing his own name; and if questioned afterward, it may be shown by parol evidence who signed the principal's name.[1] If the agent should affix only his own name to the commercial paper without his principal's name, it will be his own paper, and he cannot show by parol evidence that he intended to act for his principal, and not for himself.[2] The agent has been held in such cases, even though it may be proved that the payee knew of the agency, for he may have preferred to rely upon the credit of the agent. "Parol evidence can never be admitted to exonerate an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal at the time the contract was executed."[3] Certainly

Jones *v.* Carter, 4 Hen. & Munf. 184; Eckhart *v.* Reidel, 16 Tex. 62; Wilburn *v.* Larkin, 3 Blackf. 55; Hunter *v.* Miller, 6 B. Mon. 612. In Early *v.* Wilkinson, 9 Gratt. 68, the promissory was signed "Robert H. Early (per Sam'l H. Early), and an attempt was made to charge Sam'l H Early as the principal. It was held that this was the note of Robert H. Early, and that Samuel Early could not be held liable on it.

[1] Neal *v.* Irving, 1 Esp. 61; Barber *v.* Gingell, 3 Esp. 60; Davidson *v.* Stanley, 2 Man. & G. 721; Llewellyn *v.* Winchworth, 13 M. & W. 598; Brigham *v.* Peters, 1 Gray, 139; Morse *v.* Green, 13 N. H. 32; Woodbury *v.* Moulton, 47 N. H. 11; Haven *v.* Hobbs, 1 Vt. 238; Odd Fellows *v.* First Nat. Bk., 42 Mich. 463; Cravens *v.* Gilliland, 63 Mo. 28; First Nat. Bk. *v.* Gay, 63 Mo. 33; Mechanic's Bk. *v.* Bank of Columbia, 5 Wheat. 326.

[2] Arnold *v.* Stackpole, 11 Mass. 27; Bedford, etc., Ins. Co. *v.* Covell, 8 Met. 442; Lyons *v.* Mitler, 6 Gratt. 440; Poole *v.* Rice, 9 W. Va., 73.

[3] Nash *v.* Towne, 5 Wall. 689. See to the same effect, Magee *v.* Atkinson, 2 M. & W. 440; Hyde *v.* Paige, 9 Barb. 151; Pentz *v.* Stanton, 10 Wend. 271; Paige *v.* Stone, 10 Met. 169; Hypes' *v.* Griffin, 89 Ill. 134. See *contra*, Moore *v.* McClure, 15 N. Y. S. C. (8 Hun) 558, Talcott J.:

the agent is liable on all such notes and bills, after they have been indorsed to persons, ignorant of the agency.

It has also been held that the agent is bound on a note or bill, to which he fails to affix the name of the principal, even though he adds the word "agent" to his signature. Such a suffix is deemed to be a mere *descriptio personæ*, and does not constitute any notice of the agency to the holder or indorsee.[1]

This rule, that the agent is himself liable on commercial paper, unless he signs his principal's name, not only applies to the original execution of the paper, but also to the indorsement. If a note or bill is payable to a person, by name, without disclosing on the face of the paper that he is made payee in the capacity of an agent for another, whose name is given; any indorsement by the payee named will be his individual indorsement, and he will be personally liable thereon, although he affixed the word "agent" to his signature.[2]

But it is not always necessary that the principal's peculiar name be used by the agent in the execution of

"The fact that the name of the principal does not appear on the face of note is not, under the modern decisions in this State, at all conclusive. ... it was intended to be given in the business of the principal, was in the fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence, all covered by the averment that it is the note of the principal."

[1] Williams *v.* Robbins, 16 Gray, 77; Hall *v.* Bradbury, 40 Conn. 32; Arnold *v.* Sprague, 34 Vt. 409; Collins *v.* Buckeye State Ins. Co., 17 Ohio St. 215; Anderson *v.* Shoup, 1 Ohio St. 125; Graham *v.* Campbell, 56 Ga. 258; Toledo Iron Works *v.* Heisser, 51 Mo. 128; Bryson *v.* Lucas, 84 N. C. 280; Kenyon *v.* Williams, 19 Ind. 45; Anderson *v.* Pearce, 36 Ark. 393.

[2] Bishop *v.* Rowe, 71 Me. 263; Toledo Iron Works *v.* Heisser, 51 Mo. 128; Haight *v.* Naylor, 5 Daly, 219. But it has been held in New York, that an indorsement by the payee named with the word "agent" added indicated his intention to transfer the paper without recourse. Mott *v.* Hicks, 1 Cow. 533; Hicks *v.* Hinde, 9 Barb. 531; Babcock *v.* Beman, 1 Kern. 200. See Hager *v.* Rice, 4 Col. 90.

commercial paper, in order to bind the principal. The principal may authorize the agent to employ some other name in the place of his regular name, even the name of the agent. In all such cases the adopted name is in law held to be the equivalent of the real name of the person, and the adoption of a different name may always be established by parol evidence.[1]

§ 86. **Exceptions to the liability of agent.** — But there are some exceptions to the liability of the agent, in cases where he signs his own name to a commercial paper, and fails to disclose his agency by adding the name of his principal; Thus, where an agent draws on a debtor in favor of his principal: following the express or implied authority of the principal, he will not be liable as drawer to the principal; for as against the drawer, this draft is equivalent to a draft drawn by the principal in favor of himself.[2] The contrary has been held by the English courts,[3] but it is impossible to discover any satisfactory reason for holding the agent

[1] Brown *v.* Parker, 7 Allen, 337. See Minor *v.* Mechanics' Bk., 1 Pet. 46; Bartlett *v.* Tucker, 104 Mass. 338; Bank of Rochester *v.* Mintent, 1 Den. 405. See, also, *post*, chapter on Private Corporations, on the use of different names by a corporation.

[2] Roberts *v.* Austin, 5 Whart. 313; Mechanics' Bk. *v.* Earp, 4 Rawle, 390; Jones *v.* Lathrop, 44 Ga. 398.

[3] Le Fevre *v.* Lloyd, 5 Taunt. 749. See Ex parte Robinson, 1 Buck. 113; Kedson *v.* Dilworth, 5 Price, 564. "These decisions, subjecting an agent to personal liability as regards third persons ignorant of the circumstances under which the agent became a party, are consistent with the other principles of law applicable to these instruments. But it seems questionable whether even at law it is correct to allow an employer to recover from his agent under such circumstances, because in general, between original parties, it may be shown as a good defense at law that the bill was drawn, accepted or indorsed for the plaintiff 's accommodation, or for a purpose or consideration which has failed or been satisfied; and to allow such a principal to recover at law against his agent, is only to compel the latter to resort to a court of equity for relief, which might just as well be afforded at law, and a court of equity will certainly afford relief." Chitty on Bills (9th ed.), 34.

liable in any ordinary agency. But if the agent is a factor with a *del credere* commission, and the agent draws on the purchaser in favor of the principal, he may well be held liable as drawer, for under his commission he guarantees the payments by his purchasers. The case just mentioned is very similar to that of an indorsement by an agent to his principal. Where a bill is made payable to an agent, while he is transacting the business of his principal, it is in effect made payable to the principal, and he may sue upon it without indorsement to him.[1] The agent, therefore, at least in the case of ordinary agencies, in indorsing the paper to the principal, acts in a representative capacity, and does a formal act not essential to invest in the principal the right of property in the paper. Although it is held differently in England,[2] it is generally held that the agent is not liable as indorser on such indorsements to his principal.[3] It is probably different where the agent is a factor under a *del credere* commission, and the bill is drawn by the purchaser of commission goods in favor of the factor. It has been held that the agent is not liable as indorsers notwithstanding he is selling goods under a *del credere* commission,[4] but the better opinion is that such an agent is liable as indorser, since under his *del credere* commission he is liable as a guarantor, and it is therefore not a hardship to hold him liable on his indorsement.[5]

There is a third case in which the agent is not usually held liable as a party to commercial paper,

[1] Nave *v.* Hadley, 74 Ind. 155.

[2] Goupy *v.* Warden, 7 Taunt. 159.

[3] Warwick *v.* Noakes, Peake's N. P. 68; Kimball *v.* Bittner, 62 Pa. St. 205; Lewis *v.* Brehme, 33 Md. 431.

[4] Sharp *v.* Emmett, 5 Whart. 290; Byers *v.* Harris, 9 Heisk. 652.

[5] McKenzie *v.* Scott, 6 Bro. P. C. 280; Centourier *v.* Hastie, 8 Exch. 39; Lewis *v.* Brehme, 33 Md. 312; Wolf *v.* Koppel, 5 Hill, 558; *s. c.* 2 Denio, 368; Sherwood *v.* Stone, 14 N. Y. 267; Swan *v.* Nesmith, 7 Pick. 220; Wickham *v.* Wickham, 2 Kay & Johns. 475.

and that is where he draws against his principal in favor of a creditor of the principal. It is held by some of the courts and authorities that the agent in such a case is liable to the payee as drawer, although the payee knows of the agency.[1] But the better opinion would seem to be that the representative character of the agent's act in drawing on his principal may be taken into consideration, and he be absolved from all personal liability as drawer to the original payee.[2] But it must be observed that these exceptional cases do not include the liability of the agent to subsequent indorsees. As soon as the bill has passed into the hands of an indorsee for value, and without notice

[1] Leadbetter *v.* Farrow, 5 M. & S. 345. See, also, to the same effect Story on Agency, § 269; 1 Am. Lead. Cas. *635. "The agency under which he acted is a matter between him and his employer, but cannot protect him from the claim of the payees of the bill, who have a right to consider him as an independent drawer, notwithstanding they may have known, either from the terms of the bills themselves or from extraneous evidence, that the defendant was acting as servant to one of the houses on which the bill was drawn." Parker, J., in Mayhew *v.* Prince, 11 Mass. 55. See also Newhall *v.* Dunlop, 14 Me. 180.

[2] In Krumbaar *v.* Ludeling, 3 Mart. O. S. (*640) 700, Mathews, J., said: "The attempt of Ludeling to show that he merely acted as the agent for the Amelungs in drawing the bill on which this suit is commenced, can be considered properly in no other light than an offer of evidence to show a want of consideration in the written agreement, and that, for this reason, he is not bound to fulfill any obligation which might otherwise have resulted from it. There is no doubt of the personal liability of the drawer of a bill of exchange, who signs it without expressing his agency, when it passes into the hands of third persons having no knowledge of the circumstances under which it was drawn, and between whom and the drawer the law will not allow the consideration to be inquired into. The appellee having signed, without expressing for whom he signed, is clearly liable on the face of it; but he is at liberty to show a want of consideration, and any circumstances of fraud or violation of good faith on the part of the appellant, which may be sufficient to exonerate him from this apparent liability, the suit against him being brought by a person 'with whom he was immediately concerned in the negotiation of the instrument.'" See, to same effect, Wolfe *v.* Jewett, 10 La. O. S. 614; Lincoln *v.* Smith, 11 La O. S. 11; Hicks *v.* Hind, 9 Barb. 528.

of the agency, the agent is liable personally in whatever character his name appears upon the instrument.

§ 87. **Liability of principal on commercial paper executed in the agent's name.**— It is a general, and probably an invariable, rule of the law of commercial paper, that no one can be held liable on a bill of exchange or promissory note, whose name does not appear in some way on the paper; and in the application of this rule to the instruments executed by an agent, it is generally held that the real principal cannot be charged in suits upon negotiable instruments, unless his name is disclosed in some part of the instruments.[1] This rule is only a special application of the more general rule that every part of commercial paper must be definite and certain, and contained in the body of the instrument. The recognition of the liability on the instrument of one, whose name does not appear upon it, would be the introduction of an important element not to be found in the instrument itself. But a disposition has of late been manifested by the courts to so far relax the rule, that when the paper is signed by one as "agent," without disclosing the name of the principal, the principal may be proved by parol evidence and sued on the instrument. This is particularly true of indorsements by agents, with the word "agent" added to their signatures.[2] This rule is,

[1] Arnold *v.* Stackpole, 11 Mass. 27; Slawson *v.* Loring, 5 Allen, 340; Brown *v.* Baker, 7 Allen, 339; Bass *v.* O'Brien, 12 Gray, 477; Williams *v.* Robbins, 16 Gray, 77; Arnold *v.* Sprague, 34 Vt. 409; Pease *v.* Pease, 35 Conn. 131; Pentz *v.* Stanton, 10 Wend. 271; Hyde *v.* Page, 9 Barb. 150; Kenyon *v.* Williams, 19 Ind. 45; Thurston *v.* Munn, 1 Greene (Iowa), 231; Heaton *v.* Myers, 4 Col. 62; De Witt *v.* Walton, 5 Seld. (N. Y.) 571. See Higgins *v.* Senior, 8 M. & W. 834; Kenworth *v.* Schofield, 2 B. & C. 945; Dykers *v.* Townsend, 25 N. Y. 57; Williams *v.* Bacon, 2 Gray, 387.

[2] "It is difficult to reconcile the cases so as to ascertain with certainty when a principal is bound by a writing executed by one who signs the same as agent. But it seems to be pretty well settled, that when the person signing his name with the word 'agent' added, is in fact the

however, peculiar to the law of commercial paper, applicable only to negotiable instruments. In respect to all other contracts, the rule of liability is quite different. Whenever an agent signs a written contract of any kind in his own name, he is personally liable on the contract, even though his agency is disclosed or known.[1] The agent is also liable on all lawful oral contracts executed by him, where he fails to disclose the name of his principal.[2]

agent of the principal, and the writing is executed in the course of the business of such agency, the principal is bound by a contract signed with the agent's name with the word 'agent' added. This case is at war with the ruling in De Witt *v.* Walton, 5 Seld. 571. But that case has not been followed, if it is to be understood as deciding that the principal is not bound in any case by a writing signed by the agent in his own name with the word 'agent' added." Green *v.* Skeel, 9 N. Y. S. C. (2 Hun) 486. In this case, suit was by indorsee against the principal of an indorser who signed his own name with the word "agent" added. To the same effect, is Merchants' Bk. *v.* Central Bk., 1 Kelley (Ga.), 429. See *contra*, Haight *v.* Naylor, 5 Daly, 219. In May *v.* Hewitt, 33 Ala. 161, a bill was drawn by owners of a steamboat, and accepted by "B. Bell, captain," and it was held to be admissible to show by parol evidence who was bound as principal by the acceptance.

[1] Sayre *v.* Nichols, 5 Cal. 487; Tilden *v.* Barnard, 43 Mich. 376; Hall *v.* Cockerill, 28 Ala. 507; Nixon *v.* Downey, 49 Iowa, 166; Andrews *v.* Allen, 4 Harr. (Del.) 452; McWilliams *v.* Willis, 1 Wash. (Va.) 199; Bickford *v.* First Nat. Bk., 42 Ill. 238; Steele *v.* McElroy, 1 Sneed (Tenn.), 341; Dening *v.* Bullitt, 1 Blackf. 241; Wiley *v.* Shank, 4 Blackf. 420; Crum *v.* Boyd, 9 Ind. 289; Allen *v.* Pegram, 16 Iowa, 163; Scott *v.* Messick, 4 T. B. Mon. 535; McBean *v.* Morrison, 1 A. K. Marsh. 545; Hodges *v.* Green, 28 Vt. 358; Nugent *v.* Hickey, 2 La. Ann. 358; Fash *v.* Ross, 2 Hill (S. C.), 294; Thacher *v.* Dinsmore, 5 Mass. 299; Foster *v.* Fuller, 6 Mass. 58; Hastings *v.* Lovering, 2 Pick. 214; Whiting *v.* Dewey, 15 Pick. 428; Seaver *v.* Coburn, 10 Cush. 324; Collins *v.* Buckeye Ins. Co., 17 Ohio St. 215; Bass *v.* Randall, 1 Minn. 404; Bingham *v.* Stewart, 13 Minn. 106; Pratt *v.* Beaupre, 13 Minn. 187; Bank of Rochester *v.* Monteith, 1 Denio, 402; Stone *v.* Wood, 7 Cow. 453; Chouteau *v.* Paul, 3 Mo. 260.

[2] Irvine *v.* Watson, 5 Q. B. D. 102; Meyer *v.* Barker, 6 Binn. 228; Merrill *v.* Wilson, 6 Ind. 426; Merrill *v.* Kenyon, 48 Conn. 314; Pierce *v.* Johnson, 34 Conn. 274; Davenport *v.* Riley, 2 McCord, 198; Mithoff *v.* Byrne, 20 La. Ann. 363; Royce *v.* Allen, 28 Vt. 234; Bulton *v.* Winslow, 53 Vt. 430; Conyers *v.* Magrath, 4 McCord, 392; McComb *v.* Wright, 4

It is held in England, and was also once held in this country that the agent of a foreign principal is always bound, because the principal is inaccessible;[1] but no distinction is ordinarily recognized now between the two classes of agencies.[2]

While the agent in all such contracts may be held bound; yet if the other party chooses to cast the liability upon the undisclosed principal, he may do so. But he must elect which of the two he will hold liable, as soon as he learns who the principal is. If the third person knew at the time, when the contract was made, who the principal was, and takes the contract in the name of the agent, he cannot hold the principal liable, it being presumed from the facts and the form of the contract that he had elected to hold the agent liable.[3] But if the name of the principal was not disclosed, whether the agency was known or not, the other party can hold either the principal or agent liable, making the election when he learns the name of the principal.[4]

It would seem that, while the principal could not be held liable in a suit on a promissory note or bill of exchange, in which his name does not appear, yet he might be held liable in an independent action on the

Johns. Ch. 659; Wheeler *v.* Reed, 36 Ill. 81; McClellan *v.* Parker, 27 Mo. 162; Forney *v.* Shipp, 4 Jones N. C. 527.

[1] Armstrong *v.* Stokes, L. R. 7 Q. B. 598; Elbinger Actien-Gerellschaft *v.* Claye, L. R. 8 Q. B. 313; Story on Agency, §

[2] At least, the foreign principal will be bound, if such appears to have been the intention of the parties. Rogers *v.* March, 33 Me. 106; Bray *v.* Kettell, 1 Allen, 80.

[3] Paterson *v.* Gandasequi, 15 East, 62; Silver *v.* Jordan, 136 Mass. 319; Coxe *v.* Devine, 5 Harr. (Del.) 375.

[4] Thompson *v.* Davenport, 9 B. & C. 78; *s. c.* 2 Smith Lead. Cas. 212; Briggs *v.* Partridge, 64 N. Y. 357; Jessup *v.* Steurer, 75 N. Y. 613; Raymond *v.* Crown & Eagle Mills, 2 Met. 319; French *v.* Price, 24 Pick. 13; Hubbert *v.* Borden, 6 Whart. 79; Youghiogheny Iron, etc., Co. *v.* Smith, 16 Smith (Pa.), 340; Violett *v.* Powell, 10 B. Mon. 347.

original consideration, by the original party to the transaction, without violating any rule of commercial paper.

§ 88. **Action by principal on commercial paper made payable to his agent.** — Where a bill or note is made payable to an agent by name, it is easy enough, during the life of the agent, for the principal to secure the right of action on the paper in his own name by an indorsement of the paper to him by the agent. But if the agent is dead, or refuses to make the indorsement, it would be embarrassing, if he could not sue independently of the indorsement. The right of the principal to maintain an action on a contract, made for him by an agent in the latter's name, is generally recognized by the courts, so far as ordinary contracts are concerned.[1] There does not seem to be any objection to the application of this rule to the law of commercial paper, provided it is not allowed to affect the validity of the agent's indorsement to third persons for value. So it has been held, that the undisclosed principal may sue on a promissory note payable to his agent.[2]

§ 89. **The agent cannot delegate his authority.** — It is a general rule of the law of agency, that the agent cannot delegate his authority unless he is authorized to do so. But this prohibition of the employment of a subagent only refers to the transactions which require the exercise of a personal discretion and judgment. When an agent is appointed, the principal is presumed to rely upon the discre-

[1] N. J. Steam Nav. Co. *v.* Merchants' Bk., 6 How. 344, 381; Ford *v.* Williams, 21 How. 287; Baltimore Coal Tar etc., Co. *v.* Fletcher, 61 Md. 288; Huntington *v.* Knox, 7 Cush. 371; Eastern Railway *v.* Benedict, 5 Gray, 561; Barry *v.* Page, 10 Gray, 398; Gilpin *v.* Howell, 5 Barr, 41; Machias Hotel *v.* Coyle, 35 Me. 405; Elkins *v.* Boston, etc., R. R. Co., 19 N. H. 337; Woodruff *v.* McGhee, 30, 158; Brooks *v.* Mintun, 1 Cal. 481; Ruiz *v.* Norton, 4 Cal. 355; Ames *v.* St. Paul, etc., R. R. Co., 12 Minn. 412; Oelrichs *v.* Ford, 21 Md. 489.

[2] Nave *v.* Hadley, 74 Ind. 155.

tion and judgment of the particular person he appoints; and unless this person is authorized expressly or by necessary implication [1] to delegate his authority, he must himself transact that part of the business which involves the exercise of an independent judgment.[2]

But merely ministerial acts, which do not involve the exercise of discretion, may be performed by a subagent, without any power to delegate authority: and under this rule it has been held lawful for an agent to direct a subagent to sign a paper for the principal, after the agent has himself determined the propriety of the transaction.[3] Applying this rule to the law of commercial paper, it was held that, where an agent was authorized to borrow money for the principal, and execute a note in his name, a note executed by a third person in the name of the principal and by the direction of the agent, who had himself borrowed the money for which the note was to be given, was binding upon the principal. The mere signing was a ministerial act not involving the exercise of any judgment or discretion.[4]

[1] The agent's power to delegate his authority may be implied from the fact that the nature of the business requires it, as, for example in the collection of commercial paper, the parties to which reside in different places. See Dorchester, etc., Bank *v.* New England Bank, 1 Cush. 177; Planters', etc., Nat. Bk. *v.* First Nat. Bk. 75 N. C. 534; Krumm *v.* Jefferson Fire Ins. Co., 40 Ohio St. 225.

[2] Coles *v.* Trecothick, 9 Ves. 274; Brewster *v.* Hobart, 15 Pick. 302; Emerson *v.* Providence Hat Manuf. Co., 12 Mass. 237; Warner *v.* Martin, 11 How. (U. S.) 309; Shanklin *v.* Corp. of Washington, 5 Pet. 395; Hunt *v.* Douglas, 22 Vt. 128; Paul *v.* Edwards, 1 Mo. 30; Grady *v.* Am. Cent. Ins. Co., 60 Mo. 116; Bocock *v.* Pavey, 8 Ohio St. 270; Yates *v.* Freckleton, 2 Dougl. 623; Loomis *v.* Simpson, 13 Iowa, 532; Renwick *v.* Bancroft, 56 Iowa, 527.

[3] Lord *v.* Hall, 8 C. B. 627; Commercial Bk. *v.* Norton, 1 Hill, 501; Grinnell *v.* Buchanan, 1 Daly, 538; Norwich University *v.* Denny, 47 Vt. 13; Newell *v.* Smith, 49 Vt. 255; Ex parte Sutton, 2 Cox, 84; Eldridge *v.* Holway, 18 Ill. 445; Grady *v.* Am. Cent. Ins. Co., 60 Mo. 116.

[4] Weaver *v.* Carnall, 35 Ark. 198; Ellis *v.* Francis, 9 Ga. 327.

CHAPTER VI.

PARTNERS AS PARTIES TO COMMERCIAL PAPER.

SECTION 94. General propositions.
95. General authority of the partner.
96. Trading partnerships.
97. Other than trade partnerships.
98. Accommodation paper, liability of partners on.
99. Accommodation paper in the hands of *bona fide* indorsees.
100. Special limitations upon the authority of partners.
101. Ratification of an authorized issue of commercial paper.
102. Joint and several notes executed by a partner.
103. Form of the firm's signature.
104. Firm doing business in partner's name.
105. Signature of firm in acceptances.
106. Effect of dissolution of partnership — What notice required.
107. What powers implied in the authority to close up the business.
108. Indorsement of the firm's bills and notes receivable after dissolution.
109. Bills and notes executed before and issued after dissolution.
110. Power of ex-partners in respect to paper barred by the statute of limitations.

§ 94. **General Propositions.** — Partners are personally liable *in solido* for all the obligations of the partnership, which any member of the firm, who is authorized to represent it, has in its name assumed. Partners are of several kinds, viz.: I. Actual and nominal or ostensible. II. Secret or dormant. III. General or special. But all of them are, without exception, liable for the debts of the partnership, to the extent that they are members of the partnership.[1]

[1] Wintle *v.* Crowthey, 1 Tyrw. 215 (1 Cromp. & J. 310); DeMantort *v.* Saunders, 1 Barn. & Ad. 398; 1 Parsons' N. & B. 142, 143; Davis *v.*

But the special partner is one who, under the statutes of the different States, is permitted to enter into the partnership with a liability limited to the amount of cash capital he puts into the business. The creditors have no personal claim against the special partner.[1]

§ 95. **General authority of the partner.** — All the partners, except the secret or dormant partners, have the implied authority to bind the firm by contracts pertaining to the business of the firm. This authority is implied from the very nature and object of a partnership. A partnership is formed for the purpose of jointly transacting a business, which cannot be well attended to by one alone. Hence it could not be expected that each partner would pass upon and assent to the issue of every bill or note, that may be needed in conducting the business of the firm.[2]

Allen, 3 N. Y. 172. But a secret or dormant partner is not liable on a note or bill issued by the firm after his withdrawal, although there has been no notification of his withdrawal, since credit could not have been given to the firm in reliance upon a secret partner. Davis *v.* Allen, 3 N. Y. 168; Magill *v.* Merrie, 5 B. Mon. 168; Scott *v.* Cosminil, 7 J. J. Marsh. 416; Vacarro. *v.* Toof, 9 Heisk. 194.

[1] 1 Daniel's Negot. Inst. § 352*a*.

[2] "By the general rule of law relating to partnerships in trade, each member of it is liable for the debts and engagements of the whole company contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout Europe. And it is founded, partly on the desire to favor commerce, that merchants in partnership may obtain more credit in the world; and more especially on the principle that the members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound. But to subject a person to responsibility as a partner, for the acts of another done without his express concurrence, he must stand in one or other of these two situations: first, he must at the time of making the contract, whether bill, note, or other instrument, have been actually a partner in the joint concern; or, secondly, admitting that he was not, he must have represented or permitted himself to be represented as such, before or at the time of making the contract, either generally to all the world, or to

But in order that the act of the partner may be binding upon the other members of the firm, without their express assent, it must fall legitimately within the scope of the firm's business, as well as be done in the course of their business. Thus, for example, a partner has the power to make, accept, and negotiate commercial paper in the name of the firm, only when the nature of the firm's business requires the exercise by the partner of this implied authority. If it was unnecessary and unusual for a partnership in a particular business to issue commercial paper, the partners would not have the implied authority to make notes and draw and accept bills in the firm's name; and the paper issued by such a partner would not be binding upon the other partners, unless they expressly authorized or ratified their issue. It becomes necessary, therefore, to ascertain in what kinds of partnership the partners have the implied authority to issue notes and bills, that will bind the firm.

§ 96. **Trading partnerships.** — The most common class of partnerships, in which the partners have this implied authority, is that of trading or mercantile and manufacturing partnerships. In all these kinds of partnerships, capital is very much needed, and when trade is conducted on any large scale, it cannot be confined to the cash basis. The borrowing of money becomes an ordinary incident of trading. Hence partners in these kinds of partnerships have the implied authority to make and negotiate commercial paper in the name of the firm. And a note or bill, given or accepted by one partner in the name of the firm, will be binding upon the firm, although the partner may have used his power for his own benefit; provided the lender or holder of the paper was not aware of the fraud of the

several individuals, or to the plaintiff in particular, or to some person through whom he claims." Tindall, Ch. J., in Fox *v.* Clifton, 6 Bing. 795.

partner.[1] Under this head, it has been held that working a mill, and trading are such kinds of business from which partners may claim the implied authority to issue commercial paper in the name of the firm; but that farming is not.[2] So, also, is it the implied authority of partners engaged in buying and slaughtering cattle;[3] but, on the other hand, partners in mining or gaslighting business, have been held to have no implied authority to bind the firm by the execution and negotiation of commercial paper.[4]

[1] Kimbro *v.* Bullitt, 22 How. 256; Hayward *v.* French, 12 Gray, 453; U. S. Bank *v.* Bonney, 5 Mason, 176; Whittaker *v.* Brown, 16 Wend. 505; Onandago Co. Bk. *v.* Du Puy, 17 Wend. 47; Ihmsey *v.* Negley, 1 Casey, 297; Sedgwick *v.* Lewis, 70 Pa. St. 221; Buckner *v.* Lee, 8 Ga. 285; Sherwood *v.* Snow, 46 Iowa, 485; Chitty on Bills (13 Am. ed.), 58.

[2] Kimbro *v.* Bullitt, 22 How. 256; Greenslade *v.* Dower, 7 B. & C. 6 35 (1 Man. & Ry. 640.)

[3] Wagner *v.* Simmons, 61 Ala. 143.

[4] Dickinson *v.* Valpy, 10 B. & C. 128; Brumah *v.* Roberts, 3 Bing. N. C. 96. In the case of Dickinson *v.* Valpy, Littledale, J., said: "In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purpose of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company) to bind the rest by drawing or accepting bills. One of several persons interested in a farm has now power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a salable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent upon the plaintiff, in this

Whether a particular business requires in the partners this implied power, is a question of fact, the answer to which will very often vary with circumstances in respect to the same business. The mining or other operations may be so limited in extent that the power of the partner to bind the firm as parties to commercial paper may not be necessary to their effective prosecution; and a trading concern may carry on so small and limited a business, that this power would not be found necessary. But when mining and even farming is carried on on such an extensive scale, that large capital and credit are required, it would be unreasonable to deny to the partners of such a concern the implied authority to bind the firm by the issue of notes and bills, and recognize the same power in the smallest trading concern.[1] But in all such cases, the partners can exercise this implied authority, only so far as its exercise is necessary to the prosecution of the partnership business.[2]

§ 97. **Other than trade partnerships.** — But when a partnership's business does not require capital and credit, the partners have no implied power to bind each other as parties to commercial paper. In order to bind the other partners, the partner, executing the paper in the name of the firm, must be shown to have from the others an express authority to bind them. This has been the invariable rule in respect to a firm of practicing lawyers;[3] and likewise as to the practitioners of medicine, except that to medical

case, to have shown, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual."

[1] 1 Parsons' N. & B. 139.

[2] Cooke *v.* Branch Bank, 3 Ala. 175.

[3] Garland *v.* Jacomb, L. R. 8 Exch. 218 (6 Moak Eng. R. 289); Hedley *v.* Bainbridge, 3 Q. B. (42 E. C. L. R.) 316; Levy *v.* Pyne, Car. & M. 453; Marsh *v.* Gold, 2 Pick. 285; Friend *v.* Durgee, 17 Fla. 111; Smith *v.* Sloan, 37 Wis. 285.

partners is conceded the implied power to bind each other by paper given for medicines and whatever is necessary to the practice of the profession.[1]

§ 98. **Accommodation paper, liability of partners on.** — The implied authority of the partner to bind the firm as a party to commercial paper is limited to transactions of the kind, which are entered into for the benefit of the firm, and within the line of its business. Whenever the partner undertakes to sign the firm name to commercial paper for his own private benefit, or for the benefit of third persons, he exceeds his implied authority, and the firm will not be bound by his act, as long as the paper does not pass into the hands of the indorsee, who takes it for a valuable consideration and without notice of the fraud or wrong done to the firm.[2] There may be, and sometimes are, cases in which the partner may, in the transaction of his private business, rightfully, that is, without committing a fraud on the other partners, make, draw, accept and indorse, bills, checks and notes, in the name of the firm; and for these reasons, the English authorities seem to hold that the execution and negotiation of the firm's commercial paper by one partner for the liquidation of his private debt, is not necessarily notice to the private partner's creditor of the wrongful use of the firm's name.[3] But, since the

[1] Crosthwaite *v.* Ross, 1 Humph. 23.

[2] National Bank *v.* Law, 127 Mass. 72; Bank of Rochester *v.* Bowen, 7 Wend. 158; Foot *v.* Sabin, 19 Johns. 154; Atlantic St. Bank *v.* Savery, 82 N. Y. 294; Tomkins *v.* Woodward, 5 W. Va. 229; Chenowith *v.* Chamberlain, 6 B. Mon. 60; Boyd *v.* Plumb, 7 Wend. 309; Austin *v.* Vandemark, 4 Hill, 259; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Bloom *v.* Helm, 53 Miss. 21; Heffron *v.* Hanaford, 40 Mich. 405; Burke *v.* Wilbur, 42 Mich. 329.

[3] In Ridley *v.* Taylor, 13 East, 175, Lord Ellenborough, C. J., said: "This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs; it was drawn for a sum considerably exceeding the debt, and was not only drawn and in-

use by the partner of this implied authority for his own accommodation, cannot under any circumstances be considered necessary to the prosecution of the firm's business; and the implied authority rests upon the necessity of the implication to carry out the purposes of the copartnership; the American courts hold that in no case can the partner under his implied authority sign the firm's name to commercial paper for his own benefit. [1]

dorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed by Ewbank in the partnership name, it does not appear that the plaintiffs knew that it was drawn and indorsed by him. Under these circumstances it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which Ewbank, the partner in possession of it, had for some valuable consideration, or in virtue of some arrangement with Ord, the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate, the contrary does not either actually or presumptively appear." "As a partner may, in his individual capacity, have a claim upon the firm, in the respect of which he might draw, accept or indorse a bill in the name of the firm, it has in other cases been considered that the mere circumstance of the party to whom he delivers it, knowing that he was using it for his private benefit, does not of itself necessarily afford sufficient presumptive evidence of collusion to invalidate the transaction, and that the partner objecting to liability must prove all the facts sufficient to induce a jury to find that the partner really acted fraudulently, and that the holder had notice of the fraud." Chitty on Bills (13 Am. ed.), 60, citing Ex parte Bonbonus, 8 Ves. 542; Ridley *v.* Taylor, 13 East, 175. But see Ex parte Goulding, 2 G. & J. 118; Hope *v.* Cust, 1 East, 53; Shirreff *v.* Wilks, 1 East, 48; Green *v.* Deakin, 2 Stark. 347. In Ex parte Goulding, the Vice-Chancellor said: "After an attentive consideration of the authorities, I am of the opinion that when one partner gives the acceptance of the firm in payment of his separate debt, without authority from his copartner, such acceptance does not bind the firm." See also Yates *v.* Dalton, 28 L. J. Exch. 69; Darlington, etc., Banking Co., ex parte, in re Riches, 11 Jur. (N. S.) 122; Smith *v.* Coleman, 7 Jur. 1053, V. C. B.

[1] Rogers *v.* Batchelor, 12 Pet. 229; Smith *v.* Strader, 4 How. 404; Sweetzer *v.* French, 2 Cush. 309; Dob *v.* Halsey, 16 Johns. 34; Foot *v.* Sabin, 19 Johns. 154; Williams *v.* Wallbridge, 3 Wend. 415; Gale *v.* Miller, 54 N. Y. 538; Atlantic St. Bank *v.* Savery, 82 N. Y. 294; Union N. B. *v.* Underhill, 21 Hun (N. Y.), 178; Windham Co. Bk. *v.* Kendall,

In order to hold the other partners liable on such paper, it must be shown that they expressly authorized its issue. Mere knowledge of its negotiation is not sufficient,[1] but a formal authority is not necessary. It may be given by acts, and implied from circumstances,[2] as, for example, previous recognitions of similar transactions.[3] When the payee brings the suit on the accommodation paper, issued by the partner in the name of the firm, he makes out a *prima facie* case, by proving the execution of the paper by one of the firm;[4] and the burden of proof is on the defendants to show that the paper had been given without authority for the accommodation of the partners signing the firm's name, or of some third person.[5]

§ 99. **Accommodation paper, in the hands of bona fide indorsees.** — As long as the accommodation paper remains in the hands of the original payee, the partners can always defend against liability on the unauthorized paper. But as

7 R. I. 77: Baird *v.* Cochran, 4 Serg. & R. 397; Noble *v.* McClintock, 2 Watts & S. 152; Tompkins *v.* Woodward, 5 West Va. 229; Taylor *v.* Hillyer, 3 Blackf. 433; Mauldin *v.* Branch Bk., 2 Ala. 502; Sherwood *v.* Snow, 46 Iowa, 486; Bank of Commerce *v.* Selden, 3 Minn. 155. In Davis *v.* Smith, 27 Minn. 390, it was held that where a partner paid a private debt by a check of the firm, drawn by himself, the creditor should be charged with notice of the wrongful use of his implied authority, and that he could not hold the other partners liable on the check.

[1] Elliott *v.* Dudley, 19 Barb. 326. But it would be binding upon them if they should receive the proceeds, and fail to repudiate in a reasonable time. Foster *v.* Andrews, 2 Penn. 160.

[2] Gansevoort *v.* Williams, 14 Wend. 133.

[3] Michigan Bk. *v.* Eldred, 9 Wall. 544; Butler *v.* Stocking, 4 Seld. 108.

[4] Michigan Bk. *v.* Eldred, 9 Wall. 548; Doty *v.* Bates, 11 Johns. 544; Vallett *v.* Parker, 6 Wend. 615, Foster *v.* Andrews, 2 Penn. 160; Manning *v.* Hays, 6 Md. 5; Hamilton *v.* Summers, 12 B. Mon. 11; First Nat. Bk. *v.* Carpenter, 34 Iowa, 432; Knapp *v.* McBride, 7 Ala. 19; Davis *v.* Cook, 14 Nev. 265.

[5] Rogers *v.* Batchelor, 12 Pet. 299; Williams *v.* Wallbridge, 3 Wend. 415; Gale *v.* Miller, 54 N. Y. 539; Taylor *v.* Hillyer, 3 Blackf. 433.

soon as it passes into the hands of an indorsee, the law of negotiability applies, and enables the indorsee to recover of the other partners, if he takes the paper for value and without knowledge of its wrongful issue. The indorsee must, in order to recover, show that he is an innocent holder for value.[1] If the word "surety" was added to the signature of the firm, it would charge every holder with notice of the questionable use of the firm's name, and prevent any enforcement of the liability of those partners who did not assent to such use of the name;[2] unless the use of the firm's name as surety was in fact for the benefit of the firm when it is held that the partners may be bound by the otherwise unauthorized act of the partner.[3] So, also, when a firm's name is so indorsed on the back of the paper, that it cannot be taken as an indorsement, in the strict meaning of the term, it is constructive notice to every holder that the signature has been made as a guarantor, and hence unlawfully made, if done without the express authority of the partners.[4] But where the indorsement is made in the regular order of indorsements proper, the holder can recover on it.[5] But if the private paper of a partner is regularly indorsed by the firm's name, so that the firm appears to be the payee or a prior indorsee, the fact, that the indorsement of the firm is in the handwriting of the partner who was the maker, would not be a circumstance which would

[1] Monroe *v.* Cooper, 5 Pick. 412; Bk. of St. Albans *v.* Gilliland, 23 Wend. 311; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Hart *v.* Pottei. 4 Duer, 458; Carner *v* Cameron, 31 Mich. 373; Hogg *v.* Skene, 34 L. J. C. P. (N. S.) 153. But see Musgrave *v.* Drake, 5 Q. B. (48 E. C. L. R.) 185; Michigan Bank *v.* Eldred, 9 Wall. 548.

[2] Foot *v.* Sabine, 19 Johns. 154; Boyd *v.* Plumb, 7 Wend. 309; Austin *v.* Vandemark, 4 Hill, 259.

[3] Langan *v.* Hewitt, 13 Smedes & M. 122.

[4] National Bank *v.* Law, 127 Mass. 72. See National Security Bk. *v.* McDonald, 127 Mass. 82.

[5] Atlas Nat. Bank *v.* Savery, 127 Mass. 75; Atlantic St. Bank *v.* Savery, 82 N. Y. 294; Stimson *v.* Whitney, 130 Mass. 591.

charge subsequent indorsees for value with notice of the indorsement being an unauthorized accommodation.[1]

§ 100. **Special limitations upon the authority of partners.** — The partners may, in their articles of copartnership, impose special limitations upon the implied authority of each other to bind the firm in the issue of commercial paper; and any paper executed in violation of these limitations will be invalid in the hands of those who have knowledge of the restriction upon the power of the partners. But the innocent holder for value will be able to recover of the firm on such paper, notwithstanding its issue violates the express limitations of the articles of copartnership.[2]

§ 101. **Ratification of unauthorized issue of commercial paper.** — The members of a firm may at any time ratify the unauthorized issue of notes and bills; and if the firm knowingly receive and hold the proceeds of such paper it will operate as a ratification, as much so as a formal ratification.[3]

§ 102. **Joint and several notes executed by a partner.** The implied authority of the partner to sign the firm's name

[1] Moorehead *v.* Gilmer, 77 Pa. St. 118; Miller *v.* Consolidation Bank, 12 Wright, 514.

[2] Winship *v.* Bank of U. S., 5 Pet. 529; Kimbro *v.* Bullit, 22 How. 256; Michigan Bank *v.* Eldred, 9 Wall. 544; Waldo Bk. *v.* Lambert, 16 Me. 416; Redlow *v.* Churchill, 73 Me. 146 (40 Am. Rep. 345); Catskill Bank *v.* Stall, 15 Wend. 364; *s. c.* 18 Wend. 466; Wells *v.* Evans, 20 Wend. 251; First Nat. Bk. *v.* Morgan, 6 Hun, 346; Parker *v.* Burgess, 5 R. I. 277; Cotton *v.* Evans, 1 Dev. & B. Eq. 284; Miller *v.* Hughes, 1 A. K. Marsh. 181; Wright *v.* Brosseau, 73 Ill. 381; Bascom *v.* Young, 7 Mo. 1. See Walker *v.* Kee, 14 S. C. 142; Hibernian Bank *v.* Everman, 52 Miss. 500.

[3] Richardson *v.* French, 4 Met. 577; Whitaker *v.* Brown, 16 Wend, 505; Clay *v.* Cottrell, 18 Pa. St. 408. Hardman *v.* Bk. of Middleton, 28 Pa. St. 440.

to commercial paper does not extend to the execution of joint and several notes. The partner has no authority to bind the partners individually as parties to commercial paper and hence has no power to make a note on which they will be severally liable. But if a partner makes a joint and several note, it will be good as a joint note, though void as a several obligation.[1]

§ 103. **Form of the firm's signature.** — The truly proper form of signature for a firm, in any written contract, is for the partner who signs to write the firm name. He may add his own name, to indicate who signed the firm name, but that is not necessary. It will also be a good signature for the firm, if the partner writes the individual names of all the partners, without using the name of the partnership.[2]

Ordinarily the style of the firm must be closely followed in signing for the firm; but if there is an immaterial variation, the firm will nevertheless be bound by the signature.[3] But the firm will not be bound if the variation is material. Thus, it has been held that if the style of the firm was simply "John Blurton," the firm will not be bound on a note signed by "John Blurton & Co."[4] If, however, the firm adopt two or more names or styles of signature, as they have a right to do, the firm will be bound by either name.[5]

[1] Maclae *v.* Sutherland, 3 El. & B. (77 E. C. L. R.) 36; Perring *v.* Hone, 2 C. & P. 401; *s. c.* 4 Bing. (77 E. C. L. R.) 28. See McAuley *v.* Gordon, 64 Ga. 221.

[2] Patch *v.* Wheatland, 8 Allen, 102; McGregor *v.* Cleveland, 5 Wend. 475; Holden *v.* Bloxum, 35 Miss. 381; Morton *v.* Seymour, 3 C. B. 792; Maynard *v.* Fellows, 43 N. H. 255.

[3] Williamson *v.* Johnson, 1 B. & C. 146; Forbes *v.* Marshall, 11 Exch. 166; Faith *v.* Richmond, 11 Ad. & El. 339.

[4] Kirk *v.* Blurton, 9 M. & W. 284; Maclae *v.* Sutherland, 3 El. & B. 31. But see Drake *v.* Elwyn, 1 Caine, 184.

[5] Moffat *v.* McKissick, 8 Baxt. 517.

The general rule in this connection is that it must appear on the face of the paper that it is the obligation of the firm, so that the firm name must appear on the paper. But there is no special formality required. Thus, the signature "John Smith for John Smith & Co.," would be binding upon the firm, even though the note reads "I promise." [1] But the name of the firm must appear on the face of the paper. In no case, will a firm be bound by a bill or note made out in the name of the signing partner, unless the firm are doing business in his name.

Where an unincoporated association instructs its president or other officer to execute a note in the name of the association, the members are liable as partners for such a note, and may be sued individually as the principal makers.[2]

§ 104. **Firm doing business in partner's name.** — The partnership may adopt any name or style of signature, although the names of the partners, or of any one of them, do not appear in it. They could, therefore, adopt the name of one of the partners as the firm's name, and transact all their business in his name. But in consequence of the fact that the partner uses the same name in his private transactions, a note or bill signed in his name is *prima facie* his private obligation, so that in order to hold the firm liable on such an instrument, it must be shown affirmatively to have been given as an obligation of the firm.[3] But it has been held that if the partner, whose name is

[1] Gallway *v.* Mathew, 10 East, 264 (1 Camp. 403); Staats *v.* Howlett, 4 Den. 559; In re Clark, 14 M. & W. 469 (overruling Hall *v.* Smith, 1 B. & C. 407. See also Doty *v.* James, 11 Johns. 544.

[2] Ferris *v.* Shaw, 5 Mo. App. 279.

[3] U. S. Bank *v.* Binney, 5 Mason, 176; Mercantile Bank *v.* Cox, 38 Me. 500; Manufacturers, etc., Bank *v.* Winship, 5 Pick. 11; Bank of Rochester *v.* Monteath, 1 Denio, 402; Crocker *v.* Colwell, 46 N. Y. 212; Cunningham *v.* Smithson, 12 Leigh, 43; Buckner *v.* Lee, 8 Ga. 285; Macklin *v.* Crutchey, 6 Bush, 401; Boyle *v.* Skinner, 19 Mo. 82; South Carolina Bank *v.* Case, 8 B. & C. 433; Ex parte Bolitho, 1 Buck 100.

adopted as the firm's name, is in no private business, the presumption of law will be that the paper signed in his name is the paper of the firm.[1]

§ 105. **Signature of firm in acceptances.** — But while it is clear that the firm name must be used in making notes or drawing bills, in order to bind the firm, the rule is not strictly applied to acceptances by the firm. In England, and in several of the United States, it has been held that when a bill is drawn on the firm, the acceptance by one of the partners in his own name will be binding upon the firm; for since he could only accept for the firm, his signature could not be presumed to be an acceptance by himself.[2] But the contrary doctrine is maintained by the Supreme Court of Minnesota in a strong opinion, and the position is taken that the acceptance by a partner is not binding upon the firm, unless it is made in the name of the firm.[3] But the Minnesota court was drawn off from the fundamental reason of the matter by the idea that a statute, providing for the acceptance to be in writing, required the signature to be in the firm name. The reason for ordinarily requiring the signature to be in the firm's name is that in no other way can it be shown on the face of the in-

[1] Yorkshire Banking Co. *v.* Beason 42 L. T. R. 455.

[2] In Mason *v* Rumsey, 1 Camp. 384, the bill was drawn on "Rumsey & Co," and accepted in the name of "T. Rumsey, Sr." Lord Ellenborough said. "This acceptance does not prove the partnership; but if the defendants were partners they are both bound by it. For this purpose it would have been enough if the word 'accepted' had been written on the bill, and the effect cannot be altered by adding 'T. Rumsey, Sr.' If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it was drawn." See, to the same effect, Wells *v.* Masterman, 2 Esp. 731: Dolman *v.* Orchard, 2 C. & P. 104; Dougal *v.* Cowles, 5 Day, 511; Tolman *v.* Hanrahan, 44 Wis. 133; 1 Parsons' N. & B. 123.

[3] Heenan *v.* Nash, 8 Minn. 409.

strument that the firm was to be bound. But when a bill is drawn on a firm, no partner can accept it in his individual capacity, and hence if a partner accepts the bill in his own name, he could only have signed in the capacity of a partner. Unless the statute expressly requires that the written acceptance should be signed in the firm's name, the court can, and should, presume that the partner intended to bind the firm. No other construction would be compatible with the validity of the acceptance, and the law always inclines to that construction of a writing, which will enable it to take effect.

§ 106. **The effect of dissolution of partnership — What notice required.** — The power of the partner to bind the firm by his acts terminates with the dissolution of the partnership, it matters not how the dissolution occurs; whether by mutual consent, or expiration by its own limitations, or by the death or bankruptcy of one of the partners. The firm may also be dissolved by the retirement of one of the firm. But while the mere dissolution of the firm will, as between the partners, terminate the partner's implied power to bind the firm, yet as to third persons the implied power will continue to exist, as long as the partners have not given to the public the required notice of the dissolution. This is the ordinary rule in regard to dissolutions by mutual consent or by retirement of one or more of the partners. But when a dormant or silent partner retires, since he was not known by the public to be a partner, and hence the credit was not given to him, no notice of his retirement is required, in order to prevent his liability as a partner from continuing,[1] except, probably, as to those persons who actually knew of his connection with the firm.[2] So,

[1] Carter *v.* Whalley, 1 B. & Ad. 11; Heath and Sansom, 4 B. & Ad. 172

[2] Farrar *v.* De Flime, 1 C. & P. 580; Davis *v.* Allen, 3 N. Y. 168 Nuso Vanmer *v.* Becker, 87 Ill. 281, Cregler *v.* Durham, 9 Ind. 37

also, is no notice required to terminate the liability of partners, where the dissolution occurs by operation of law in consequence of the death or bankruptcy of one or more of of the partners.[1] But in the case of every other dissolution, the partners will continue to be liable on the contracts made in the name of the firm, unless the required notice is given.[2]

The law requires that the partners shall do all that may be expected of a reasonably prudent man, in order to bring the dissolution to the knowledge of those interested. The partners have not done all that might reasonably be expected of them, until they have given actual notice by mail or in person, as the case might be, to all those who have been dealing more or less regularly with the firm. Notice by publication would not be sufficient, as to them.[3] But since actual notice could not be given to all the world, in respect to those who are not regular dealers with the firm, it is only required of the partners to give notice of the dissolution by publication in the daily press.[4] But in any

[1] Dickinson *v.* Dickinson, 25 Gratt. 321; Williams *v.* Mathews, 14 La. Ann. 11. But if provision is made in the will of the deceased partner for the continuance of the partnership, there is practically no dissolution of the firm, and the estate will be bound by the contracts of the firm, made after the death of the partner. Blodgett *v.* American Nat. Bank, 49 Conn. 9.

[2] Cony *v.* Wheelock, 33 Me. 366; Whitman *v.* Leonard, 3 Pick. 177; Lansing *v.* Gaine, 2 Johns. 300; Bristol *v.* Sprague, 8 Wend. 423; Davis *v.* Allen, 3 N. Y. 172; Ulrich *v.* McCormick, 66 Ind. 246; Doversy *v.* Kellogg, 44 Ill. 114.

[3] Bristol *v.* Sprague, 8 Wend. 423; Austin *v.* Holland, 69 N. Y. 571; Vernon *v.* Manhattan Co., 22 Wend. 183; Parkin *v.* Carruthers, 3 Esp. 248; Hamburg *v.* Rungles, 2 Morris (Pa.), 148; Holland *v.* Long, 57 Ga. 36; Stewart *v.* Sonneborn, 51 Ala. 126; Haynes *v.* Carter, 12 Heisk. 7; Gilchrist *v.* Brande, 58 Wis. 184. It has been held that persons who merely discount the paper of the firm are not so far considered regular dealers of the firm, as to require actual notice of the dissolution to be given to them. City Bank *v.* McChesney, 20 N. Y. 240; City Bank *v.* Dearborn, 20 N. Y. 244. But see Mechanic's Bank *v.* Livingston, 33 Barb. 458; Bank *v.* Mudgett, 45 Barb. 663.

[4] Lovejoy *v.* Spafford, 93 U. S. 440; Uhl *v.* Harney, 78 Ind. 26; Dick-

case, notice is not necessary, where the third person, who wishes to hold the partners still liable as such, has received from some other source actual knowledge of the dissolution. The actual knowledge is equivalent to the receipt of a notice.[1]

§ 107. **What powers implied in the authority to close up the business.** — The dissolution of the partnership terminates all implied powers of the partners to bind the firm, except those powers which may be necessary in closing up the business of the concern. These necessary powers may be exercised by any one of the partners, unless in the dissolution of the partnership provision is made, and notice given to the world, that some one of the partners is alone authorized to act for the firm in closing up its business.

As a general proposition, unless the partners expressly authorize it, no partner can after dissolution bind the other members of the firm by any note or bill he may make in the name of the firm, or by an acceptance of a bill, or by the issue of a check, for the reason that these powers are not considered necessary in closing up the business of the firm.[2] So, also, is it impossible for one partner after

inson *v.* Dickinson, 25 Gratt. 321; City Bank *v.* McChesney, 20 N. Y. 240; Ketcham *v.* Clark, 7 Johns. 147; Backus *v.* Taylor, 84 Ind. 503; Godfrey *v.* Turnbull, 1 Esp 371. See Gaar *v.* Huggins, 12 Bush.. 259.

[1] Lovejoy *v.* Spafford, 93 U S. 441; Parkin *v.* Carruthers, 3 Esp. 248; Hart *v.* Alexander, 2 M. & W. 484; Ketcham *v* Clark, 6 Johns. 144; Nat. Bank *v.* Morton, 1 Hill, 572; Davis *v.* Allen, 3 N. Y. 172; Davis *v.* Keyes, 38 N. Y. 94; Stimson *v* Whitney, 130 Mass. 591; Prentiss *v.* Sinclair, 5 Vt. 149; Dickinson *v.* Dickinson, 25 Gratt. 329; Martin *v.* Walton, 1 McCord, 16.

[2] Parker *v.* Macomber, 18 Pick. 505; Whitman *v.* Leonard, 3 Pick. 177; White *v.* Tudor, 24 Tex. 641; Haddock *v.* Crocheron, 32 Tex. 276; Martin *v.* Walton, 1 McCord, 16; Parker *v.* Cousins, 2 Gratt. 372; Long *v.* Story, 10 Mo. 636; Palmer *v.* Dodge, 4 Ohio St. 21; Myatt *v.* Bell, 41 Ala. 222; Bank of Montreal *v.* Page, 98 Ill. 119; Wrightson *v.* Pullan, 1 Stark. 375;

dissolution, without express authority, to bind his copartners by a renewal of a bill or note, given before the dissolution for a firm debt.[1]

The authority to give or renew notes and bills cannot be implied from the express authority of one or more of the partners to "use the name of the firm in liquidation only of past business;" or by similar grants of authority.[2] But while this is the general rule, we find that in Pennsylvania the partner is held to be authorized to bind the firm by the issue of notes and bills, given in settlement of the past business of the firm.[3]

§ 108. **Indorsement of the firm's bills and notes receivable after dissolution.** — Where the dissolution is ef-

Dolman *v.* Orchard, 2 C. & P. 104; Kilgour *v.* Finlayson, 1 H. Bl. 155; Lansing *v.* Gaine, 2 Johns. 300; Hackley *v.* Patrick, 3 Johns. 537; Sanford *v.* Mickles, 4 Johns. 224; Walden *v.* Sherburne, 15 Johns. 409; National Bank *v.* Morton, 1 Hill, 572; Van Kenren *v.* Parmelee, 2 N. Y. 525; Gale *v.* Miller, 54 N. Y. 536; Perrin *v.* Keene, 19 Me. 355; Dodd *v.* Bishop, 30 La. Ann. 1180; Curry *v.* White, 51 Cal. 530; Lockwood *v.* Comstock, 4 McLean, 383; Tombeckbee Bank *v.* Dumell, 5 Mason, 56; F. & M. Bank *v.* Kercheval, 2 Mich. 506; Smith *v.* Sheldon, 35 Mich. 42; Hamilton *v.* Seaman, 1 Ind. 185; Floyd *v.* Miller, 61 Ind. 225; Bank of Port Gibson *v.* Baugh, 9 Smedes & M. 290.

[1] National Bank *v.* Norton, 1 Hill, 572; Parker *v.* Cousins, 2 Gratt. 373; Stone *v.* Chamberlain, 20 Ga. 259; Long *v.* Story, 10 Mo. 636; Moore *v.* Lackman, 52 Mo. 323; Palmer *v.* Dodge, 4 Ohio St. 21; Wilson *v.* Forder, 20 Ohio St. 89; Martin *v.* Kirk, 2 Humph. 529; Hamilton *v.* Seaman, 1 Ind. 185. But the attempted renewal does not destroy the liability of the partners on the original paper, and if the pleadings are in proper form, judgment may be rendered against them on the original obligation, in the same suit which was brought on the renewed note. Wilson *v.* Forder, 20 Ohio St. 89.

[2] Martin *v.* Kirk, 2 Humph. 529; National Bank *v.* Norton, 1 Hill, 572 ("to settle business of the firm, and sign its name for that purpose"); Hamilton *v.* Seamen, 1 Ind. 185 ("to settle all demands in favor of or against the firm"); Lockwood *v.* Comstock, 4 McLean, 383; Bank of Montreal *v.* Page, 98 Ill. 121.

[3] Davis *v.* Desanque, 5 Whart. 530; Robinson *v.* Taylor, 4 Pa. St. 242; Brown *v.* Clark, 14 Pa. St. 469.

fected by any other cause than by the death of a partner, an ex-partner has no implied authority to indorse bills and notes received by the firm. It is said that upon the dissolution the partners become tenants in common of the partnership property, and it therefore requires the express consent of all to make a complete indorsement of the firm's commercial paper.[1] But if the dissolution occurs through the death of one of the partners, the surviving partners become possessed of the entire partnership estate as administrators, and in this capacity they have the power to indorse all bills and notes payable to the firm.[2] It is true that the personal representatives of the deceased partner have no control over the partnership assets, and the surviving partner or partners can dispose of any of the firm's property, only accountable to the deceased partner's personal representatives for the due administration of the estate. But it is very doubtful if, in the case that there are two or more surviving partners, one of them could indorse the firm's bills receivable without the consent of the others. The surviving partners must, for the same reasons as prevail in other kinds of dissolution, be held to be tenants in common of the partnership property, and the assignment of any of it requires the assent of all.

§ 109. **Bills and notes executed before, and issued after, dissolution.** — Since bills and notes, and other commercial paper, take effect from, and have no validity before, delivery; if such a paper, signed in the firm name, and purporting to be a partnership obligation, is delivered

[1] Abel *v.* Sutton, 3 Esp. 109; Lumberman's Bank *v.* Pratt, 51 Me. 563; Fellows *v.* Wyman, 33 N. H. 351; Parker *v.* Macomber, 18 Pick. 505; Sanford *v.* Mickles, 4 Johns. 224; Humphreys *v.* Chastain, 5 Ga. 166; Bogeran *v.* Gueringer, 14 La. Ann. 478; White *v.* Tudor, 24 Tex. 639.

[2] Johnson *v.* Berlizheimer, 84 Ill. 54; Commercial Nat. Bank *v.* Proctor, 98 Ill. 558; Jones *v.* Thorn, 2 Mart. (N. S.) 463; Crawshay *v.* Collins, 15 Ves. 218.

after the dissolution of the partnership by one of the partners, without the consent of the others, the partners will not be liable on the paper, not even to *bona fide* indorsees for value, provided they are charged with constructive notice of the dissolution, even though the paper has been antedated to indicate that it had been issued before the dissolution. Although commercial paper is presumed to have been delivered on the date stated in it, yet it is not a conclusive presumption; and it may be shown by parol evidence, it seems, even as against *bona fide* indorsees, that the paper had been delivered on a subsequent day.[1]

Not only will the mere antedating of a firm bill or note, which is issued after dissolution, not make the other partners liable on it; but it is also very generally held that since a bill or note is operative only from the day of de-

[1] In Lansing *v.* Gaine & Ten Eyck, 2 Johns. 300, the notes issued by T. after dissolution had been antedated, in order to appear that they had been issued before dissolution. In holding that the defendant, Gaine, could not be held liable on them, Kent, Ch. J. said: "The notes upon which this suit is brought were delivered by Ten Eyck to the payees, some time after notice had been given in the newspapers of the dissolution of the partnership of Gaine and Ten Eyck. The date of the notes then becomes immaterial, as they were valid only from the time of their delivery; and unless the contrary be shown, the presumption will be that they were then actually drawn, and were antedated by mistake or design. If they had been previously drawn, they had no force while in the possession and under the control of the maker. To all legal purposes the notes are to be considered as made or drawn when they were delivered. * * * The fact, then, that the notes were issued by Ten Eyck, after the partnership was dissolved, is sufficient to exempt Gaine from being bound by the notes, even if they had been given for a partnership concern. The power of one partner to bind the other ceases with the existence of the partnership. * * * If the notes while in the hands of the payees did not bind Gaine, they are equally inoperative in the hands of the plaintiff. They were negotiated to him after they had been dishonored, and he took them, subject to all the equity that existed against them in the hands of the original payees." See, to the same effect, Weightman *v.* Pullan, 1 Stark. 375; Abel *v.* Sutton, 3 Esp. 108. That such a bill or note could not bind the partners, as against *bona fide* indorsees for value, see Bristol *v.* Sprague, 8 Wend. 423.

livery, a firm bill or note delivered after the dissolution will not bind the firm, although it had been fully executed before dissolution and needed only the delivery to give it effect. Any instrument of indebtedness is without life until it has been delivered to the obligee or to some third person for his benefit.

§ 110. **Power of ex-partners in respect to paper barred by statute of limitations.** — Although it is sometimes held that an ex-partner can by his promise, acknowledgment or part-payment, in the name of the firm, remove the bar of the statute of limitations from a firm note or bill;[2] yet the better opinion is that the ex-partner has no power after dissolution, by a promise, an acknowledgment or part-payment, to take a bill or note of the firm out of the statute of limitations, so as to revive the other partner's liability.[3]

[1] Woodford *v.* Dorwin, 8 Vt. 82; Gale *v.* Miller, 54 N. Y. 536 (in this case the paper was a check). The same position is assumed in respect to an indorsement made before dissolution, with delivery of the paper after dissolution. Abel *v.* Sutton, 3 Esp. 108; Glasscock *v.* Smith, 25 Ala. 474. But see, apparently *contra*, Usher *v.* Dauncey, 4 Camp. 97; Lewis *v.* Reilly, 1 Q. B. 347.

[2] McIntire *v.* Oliver, 2 Hawks (N. C.), 209; Whitcomb *v.* Whiting, Dougl. 652.

[3] Bell *v.* Morrison, 1 Pet. 351; Exeter Bank *v.* Sullivan, 6 N. H. 124; Van Kenren *v.* Parmelee, 2 Comst, 523; Levy *v.* Cadet, 17 Serg. & R. 126; Belote *v.* Wynne, 7 Yerg. 534.

CHAPTER VII.

PRIVATE CORPORATIONS, AS PARTIES TO COMMERCIAL PAPER.

SECTION 114. Corporations, private and public.
115. Power of private corporations to issue commercial paper.
116. *Bona fide* holders of papers issued *ultra vires* — Accommodation paper.
117. Commercial paper of corporation under seal.
118. Power of corporations to be payees and indorsees.
119. Power of corporations to appoint agents to execute their commercial paper.
120. Implied powers of the bank cashier.
121. Implied powers of the president.
122. Implied powers of other officers.
123. Form of signature by the agents of corporations.
124. Form of signature, continued.
125. Form of acceptance by agent of corporation.
126. Form of indorsement by agent of corporation.
127. Exceptions as to cashiers of banks.
128. Drafts or warrants of one corporate officer upon another.

§ 114. **Corporations, private and public.** — All corporations are divisible into two essentially different classes, viz. : private and public. Private corporations are all those which are instituted for the prosecution of some private interest or business, and whose capital, franchises, and other proprietary rights are owned by, and managed for the benefit of, private individuals. Corporations are called public or municipal when "the whole interests and franchises are the exclusive property and domain of the government itself," [1] and they are instituted to secure some benefit to the public, usually the establishment of an effective local government. Cities, towns, villages, counties, townships or

[1] Darmouth College *v.* Woodward, 4 Wheat. 636

parishes, are various kinds of public corporations: while railroads, turnpike roads, canals, and bridge companies, banks, all associations for the prosecution of trade, mining and manufacturing, and every other corporation, the object of whose creation is private gain or benefit, are private corporations. The character and powers of these two classes of corporations are so vitally different that they must be considered separately in respect to their power to become parties to commercial paper, and private corporations will be considered first.

§ 115. **Power of private corporations to issue commercial paper.** — It is needless to state formally that private corporations have the power to execute bills, notes, and other commercial paper, when that power is expressly given to them in their charters, or by the general laws of the State, under which they were incorporated. Nor is it necessary to state that they have not the power, when they are expressly prohibited from exercising the power.[1] There is room for doubt and uncertainty only in respect to the extent to which the power to issue commercial paper can be inferred or implied from the character, and the express powers, of the corporation. According to the English authorities, the power will only be implied, when the corporation cannot without it carry on its business, or attain the end for which it was created; and it cannot be im-

[1] But it has been held that a law, forbidding certain corporations from issuing commercial paper as a circulating medium, or from dealing in commercial paper, will not be construed as prohibiting such corporations from issuing and receiving such commercial paper in the course of their ordinary business: Blair *v.* Perpetual Ins. Co., 10 Mo. 561; Buckley *v.* Briggs, 30 Mo. 452; Western Cottage Organ Co. *v.* Reddish, 51 Iowa, 55; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Atty.-Gen. *v.* Life & Fire Ins. Co., 9 Paige, 470; Partridge *v.* Badger, 25 Barb. 146; White's Bank *v.* Toledo, etc., Ins. Co., 12 Ohio St. 601; Mumford *v.* Am. L. Ins. Co., 4 N. Y. 463; Potter *v.* Bank of Ithaca, 7 Hill, 530.

plied from the power to contract debts, since the power to issue commercial or negotiable paper, involves something more than the contraction of a debt, viz.: the imposition upon the corporation of the liability to innocent indorsees for debts which the corporation is not authorized to contract. The two powers are held to be essentially distinct and separate.[1]

Not only has it been held in England that railroad companies have not the implied power to issue commercial paper in the course of their ordinary business;[2] but the implied power has also been denied to a waterworks company,[3]

[1] In Bateman *v.* Mid-Wales Ry Co., L. R. 1 C. P. 499, 509,512, Erle, C. J., said: "The question is whether this company, being a corporation created for the specific purpose of making a railway, can lawfully bind itself by accepting a bill of exchange. I am of opinion that it cannot. The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value; and I conceive it would be altogether contrary to the principles of law which regulate such instruments that they should be valid or not, according as the consideration between the original parties was good or bad, or whether, in case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors were incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that in respect of the former the corporation might be sued by an indorsee, but in respect of the latter not." Montague Smith, J., said: "I am clearly of opinion that it was not within the competency of this company to accept bills. It is a company incorporated for the formation of a railway, with a limited capital and limited powers of borrowing money. If such a company had power to accept bills of exchange, the consequence would be either that they might bind themselves by acceptances to an unlimited amount, or there must in each case be an inquiry whether the bill was given for the payment of a just debt, or for a purpose not warranted by their incorporation."

[2] Bateman *v.* Mid-Wales Ry. Co., L. R. 1 C. P. 499. But see Peruvian R. R. *v.* Thames, etc., Ins. Co., L. R. 2 Ch. 617.

[3] Neale *v.* Turton, 4 Bing. 149; Broughton *v.* Manchester, etc., Waterworks, 3 B. & Ald. 1.

to mining companies,[1] to a salvage company,[2] a gas company[3] and to a cemetery company.[4] And, according to the English rule, only trading corporations, like a bank or the East India Company, have the implied power to issue commercial paper.[5]

But while the distinction thus made by the English courts may be technically sound, here the reason for it is outweighed by the consideration that a large part of the trade, manufacturing and mining of the country is conducted by corporations, and that therefore it would be embarrassing and harassing to creditors to recognize this distinction. Accordingly, the broad rule is laid down by the courts in the United States, that whenever a corporation can contract a debt for a certain object, it may cast the indebtedness into the form of commercial paper, and give its negotiable note, or accept a bill of exchange, for the amount. It is thus the American rule that all corporations can become liable as parties to commercial paper, who can contract debts.[6] For example, the implied power to issue

[1] Lickinson *v.* Valpy, 10 B. & C. 128; Brown *v.* Byers, 16 M. & W. 252; Bult *v.* Morrell, 12 A. & E. 745.

[2] Thompson *v.* Universal Salvage Co., 1 Exch. 694.

[3] Bramah *v.* Roberts, 3 Bing. N. C. 963.

[4] Steele *v.* Harmer, 14 M. & W. 831 (4 Exch. 1).

[5] "When a company like the Bank of England, or the East India Company, is incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes." Best, J., in Broughton *v.* Manchester, etc., Waterworks, 3 B. & Ald. 1.

[6] "No question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day or on demand, when such note is given for any of the legitimate purposes for which the company was incorporated." Willard, J., in Moss *v.* Averill, 10 N. Y. 449, 457. "A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge, it may contract a debt for labor,

commercial paper has been conceded to railroad companies,[1] to mining companies,[2] a building fund association,[3] a plank road company,[4] all sorts of manufacturing companies;[5] to a mercantile exchange, or a religious organization, in buy-

the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor; and as the evidence of the indebtedness, it may execute to the creditors a note, a bond, or a mortgage, whether the debt be for the money borrowed, or the work, material or lands." Sandford, V. C., in Barry *v.* Merchants' Exchange Co., 1 Sand Ch. 280. "When a corporation can lawfully purchase property, or procure money on loan in the course of its business; the seller or lender may exact, and the purchaser or borrower must have the power to give, any known assurance which does not fall within the prohibition, express or implied, of some statute." Comstock, J., in Curtis *v.* Leavitt, 15 N. Y. 66. See also, to same effect, Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; Rockwell *v.* Elkhorn Bank, 13 Wis. 653; Barnes *v.* Ontario Bank, 19 N. Y. 152; Munn *v.* Commission Co., 15 Johns. 44; Millard *v.* St. Francis, etc., Academy, 8 Bradw. 341; Ward *v.* Johnson, 95 Ill. 215, 238; Moss *v.* Oaklee, 2 Hill, 265; Safford *v.* Wyckoff, 4 Hill, 442; Moss *v.* Rossie Lead Mining Co., 5 Hill, 137; Hamilton *v.* Newcastle, etc., R. R. Co., 9 Ind. 359; Straus *v.* Eagle Ins. Co., 5 Ohio st. 59; Clarke *v.* School District, 3 R. I. 199; Lucas *v.* Pitney, 3 Dutch. 221; Olcott *v.* Tioga R. R. Co., 40 Barb. 179 (27 N. Y. 546); Mechanics' Banking Ass'n *v.* N. Y. etc., White Lead Co., 35 N. Y. 505; Fay *v.* Noble, 12 Cush. 1; Monument Nat. Bk. *v.* Globe Works, 101 Mass. 57; Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; Magee *v.* Mokelumne Hill Canal, etc., Co., 5 Cal. 258; Oxford Iron Co. *v.* Spradley, 46 Ala. 98; Richmond, etc., R. R. Co. *v.* Snead, 19 Gratt. 354; Union Bank *v.* Jacobs, 6 Humph. 515.

[1] Railroad Co. *v.* Howard, 7 Wall. 412; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546 (40 Barb. 179); Lucas *v.* Pitney, 27 N. J. L. 221; Richmond, etc., R. R. Co. *v.* Snead, 19 Gratt. 354; Hamilton *v.* Newcastle R. R. Co., 9 Ind. 359; Union Bank *v.* Jacobs, 6 Humph, 515.

[2] Moss *v.* Bossie Lead Mining Co., 5 Hill, 137; Moss *v.* Averill, 10 N. Y. 457; Mahoney Mining Co. *v.* Anglo-Cal. Bank, 104 U. S. 192.

[3] Davis *v.* West Saratoga B. Union, 32 Md. 285.

[4] Smith *v.* Law, 21 N. Y. 296.

[5] A flouring mill, Smith *v.* Eureka Flour Mills Co., 6 Cal. 1; glass factory, Molt. *v.* Hicks, 1 Cow. 513; Clark *v.* Farmers', etc., Manuf. Co., 15 Wend. 256; Mechanics' Bank Assn. *v.* N. Y., etc., White Lead Co., 35 N. Y. 505; Monument Nat. Bk. *v.* Globe Works, 101 Mass. 57; Oxford Iron Co. *v.* Spradley, 46 Ala. 98.

ing lands and erecting buildings ;[1] to the trustees of a society formed for the purpose of erecting a monument ;[2] and, as a matter of course, to all mercantile corporations.[3] But it has been held in Mississippi, that an insurance company cannot contract debts or borrow money, and consequently cannot make a negotiable note or draw or accept a bill of exchange.[4]

§ 116. **Bona fide holders of paper issued ultra vires — Accommodation paper.** — As between the original parties to the paper, a corporation can defend in a suit on its commercial paper, by pleading that its issue was an act *ultra vires.* But when the paper passes into the hands of an innocent indorsee for value, the common rule of negotiable paper applies, that the indorsee takes the paper free from the equitable defenses that taint the character of the paper while it is in the hands of the original payee.[5] And even

[1] Barry *v.* Merchants' Exchange Co., 1 Sand. Ch. 280; Davis *v.* Proprietors' Meeting House, 8 Met. 321.

[2] Hayward *v.* Pilgrim Society, 31 Pick. 270.

[3] Munn *v.* Commission Co., 15 Johns. 44; Fay *v.* Noble, 12 Cush. 1; Ketchum *v.* City of Buffalo, 4 Kern. 356; Commercial Bank *v.* Newport Man. Co., 1 B. Mon. 13; Clark *v.* Farmers' Woolen Man. Co., 15 Wend. 256.

[4] Bacon *v.* Miss. Ins. Co., 31 Miss. 116.

[5] "The negotiable security of a corporation, which on its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the corporation, and in violation of the laws of the State where it was actually issued." Walworth, Ch., in Stoney *v.* Am. Life Ins. Co., 11 Paige, 635. To the same effect, see Safford *v.* Wyckoff, 4 Hill, 442; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; National Bank *v.* Wells, 79 N. Y. 498; Supervisors *v.* Schenck, 5 Wall. 784; Bis *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Mitchell *v.* Rome R. R. Co., 17 Ga. 574; Madison, etc., R. R. Co. *v.* Norwick Sav. Society, 24 Ind. 457; Hart *v.* Mo., etc., F. & M. Ins. Co., 21 Mo. 91: Hall *v* Auburn Turnpike Co., 27 Cal. 255.

where a corporation has the authority to issue notes and bills only on certain express conditions, and issues them in violation of the inferential prohibition, *i.e.*, independently of the conditions, the paper will not be void in the hands of innocent indorsees for value, unless the legislature has so expressly declared them to be void.[1] But when a corporation has the power, express or implied, under any or certain circumstances, to issue commercial paper in the course of its regular business, it will be presumed in the absence of express proof to the contrary, that a note or bill of such a corporation was issued in conformity with, and within the limitation of, its powers.[2]

Unless a corporation is expressly authorized to become a party to accommodation paper, it has not the power to bind itself by its issue, for accommodation paper can not be considered to be issued in the course of the regular business of the corporation, unless the corporation has been expressly authorized, and has been expressly created, to do that kind of business.[3] But if the accommodation has been so issued by the officers of the corporation that an indorsee for value could take it without notice of its objectionable character, such indorsee may hold the corporation

[1] Zabriskie *v.* Cleveland, etc., R. R. Co., 23 How. 381; Webb *v.* Comrs. Home Bay, L. R. 5 Q. B. 642. See Tracy *v.* Talmage, 14 N. Y. 162. So, likewise, bonds issued by a corporation in excess of the amount authorized, are nevertheless binding upon the corporation in the hands of innocent purchasers. Ellsworth *v.* St. Louis R. R. Co , 98 N. Y. 553.

[2] Supervisors *v.* Schenck, 5 Wall. 784; Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; Mitchell *v.* Rome R. R. Co., 17 Ga. 574; Hart *v.* Mo., etc., F. & M. Ins. Co., 21 Mo. 91; Lafayette Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 294.

[3] West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Ætna Nat. Bank *v.* Charter Oak Ins. Co., 50 Conn. 167; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; Morford *v.* Farmers' Bank, 26 Barb. 568; Culver *v.* Reno Real Estate Co., 91 Pa. St. 367; Savage Mfg. Co. *v.* Worthington, 1 Gill, 284; Beecher *v.* Dacey, 45 Mich. 92.

liable.[1] The same rule applies to corporations becoming guarantors or sureties for another. Unless expressly authorized, their guaranties are *ultra vires*, and therefore illegal acts.[2]

§ 117. **Commercial paper of corporations under seal.** The general rule of the law of commercial paper is that it must not be sealed, in order to be negotiable.[3] But according to the early common-law rule, a corporation could not make a lawful binding contract, except under its corporate seal; and, therefore, any promissory note or bill of exchange issued by a corporation had to be impressed with the corporate seal. Following the general rule that the seal destroyed the negotiability of the instrument, it was formerly held that any contract under the corporate seal must at common law be declared on as a bond or contract under seal.[4] But it is now very generally held, *first*, that a corporation may make any contract or execute any legal instrument, without using its corporate seal, in all cases in which this may be done by natural persons;[5]

[1] Bird *v.* Daggett, 97 Mass. 494; Monument Nat. Bank *v.* Globe Works, 101 Mass. 57; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309; 19 N. Y. 312; Morford *v.* Farmers' Bank, 26 Barb. 568; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421; National Bank *v.* Wells, 79 N. Y. 498; Madison, etc., R. R. Co. *v.* Norwich Sav. Society, 24 Ind. 457; Hall *v.* Auburn Turnpike Co., 27 Cal. 255

[2] Madison, etc., Plank Road Co. *v.* Watertown, etc., Plank Road Co., 7 Wis. 59; Arnot *v.* Erie R. R. Co., 12 N. Y. S. C. (5 Hun) 608; Madison, R. R., etc. *v.* Norwich Sav. Society, 24 Ind. 457.

[3] See *ante*, § 32.

[4] Porter *v.* Androscoggin, etc., R. R. Co., 37 Me. 349; Clark *v.* Farmers', etc., Mfg. Co., 15 Wend. 256; Benoist *v.* Carondelet, 8 Mo. 250.

[5] Bank of Columbia *v.* Patterson, 7 Cranch, 299; Fleckner *v.* Bk. of U. S., 8 Wheat. 338; Bank of United States *v.* Dandridge, 12 Wheat. 64; Buckley *v.* Briggs, 30 Mo. 452; McCullough *v.* Talledega Ins. Co., 46 Ala. 376; Trustees of University *v.* Moody, 62 Ala. 389; Whitford *v.* Laidler, 94 N. Y. 145; Baptist Church *v.* Mulford, 3 Halst. L. 185; Christian Church *v.* Johnson, 53 Ind. 273; Sheffield School Township *v.* An-

and, *secondly*, that if the seal is used by a corporation in the execution of what would otherwise be a negotiable instrument, the use of the seal will not destroy the negotiable character of the paper.[1]

§ 118. **Power of corporations to be payees and indorsees.** — If there is a lawful debt due to any corporation, it may be liquidated by a note or bill, in which the corporation is made the payee or indorsee. In other words, a corporation has the implied power to take a note or bill for any debt due it.[2] But no corporation has the power to make a business of lending money, and taking the borrower's note or bill for it, unless this power is expressly given to the corporation in its charter or by the general laws under which the association was incorporated.[3]

dress, 56 Ind. 157; Town of New Athens *v.* Thomas, 82 Ill. 259; Merrick *v.* Burlington, etc., Plank Road Co., 11 Iowa, 75.

[1] Moran *v.* Miami Cor., 2 Black, 722; White *v.* Vermont, etc., R. R. Co., 21 How. 575; Mercer County *v.* Hackett, 1 Wall. 95; Murray *v.* Lardner, 2 Wall. 110; Clark *v.* Iowa City, 20 Wall 583; Haven *v.* Grand Junction R. R., etc., Co., 109 Mass. 88; Re Land Credit Co. of Ireland, L. R. 4 Ch. 460; Re General Estate, Co., L. R. 3 Ch. 758; Winfield *v.* Hudson, 28 N. J. L. 255; Brainerd *v.* N. Y., etc., R. R. Co., 25 N.Y. 496; Morris Canal, etc., Co. *v.* Fisher, 9 N. J. Eq. 699; Morris Canal, etc., Co. *v.* Lewis, 12 N. J. Eq. 323; Nat. Exch. Bank *v.* Hartford, etc., R. R. Co., 8 R. I. 375; Miller *v.* Rutland, etc., R. R. Co., 40 Vt. 399; Beaver County *v.* Armstrong, 44 Pa. St. 63; Bunting's; Admrs. *v.* Camden, etc.,R.R. Co, 81 Pa. St. 284; Mason *v.* Frick, 105 Pa. St. 162; Phila., etc., R.R. Co. *v.* Smith, 105 Pa. St. 195; Phila., etc., R. R. Co. *v.* Fidelity Co., 105 Pa., St. 216; Barrett *v.* Schuyler Co. Court, 44 Mo. 197; Smith *v.* Clark County, 54 Mo. 58.

[2] Lucas *v.* Pilney, 27 N. J. L. 221; Hardy *v.* Merriweather, 14 Ind. 203; McIntire *v.* Preston, 10 Ill. 48; Frye *v.* Tucker, 24 Ill. 180; Buckley *v.* Briggs, 30 Mo. 452.

[3] Waddill *v.* Alabama R. R. Co., 35 Ala. 323; Grand Lodge of Freemasons *v.* Waddill, 36 Ala. 313. In Madison, etc., Plank Road Co. *v.* Watertown Plank Road Co., 7 Wis. 59, it was held that a plank road company has not the power to lend money generally, but that it may advance money to a contractor with which to build a section of the road. It is presumably not intended, by these decisions, to maintain that a corporation, having funds for a beneficial object, for example, like the Grand

But whenever a corporation exceeds its powers in taking commercial paper as payee or indorsee, the parties liable on the paper cannot take advantage of that fact as a defense to the action on the paper by the corporation; for, having made the paper payable to the corporation, and received its funds as a consideration therefor, the maker, drawer, acceptor or indorser, as the case might be, is estopped from denying the capacity of the corporation to take the paper.[1]

In the same manner, any one sued upon a negotiable instrument by a corporation cannot plead the illegality of the incorporation, not even a corporator.[2] The stockholders of the corporation and the State are alone empowered to take exception to the exercise of this unauthorized power. What their remedies are and under what circumstances the remedies may be resorted to, need not be discussed in this connection.

It follows, as a necessary consequence, that if a corporation has the power to receive commercial paper as a payee or indorsee, it will have the power to assign such paper by indorsement; for, according to the law of commercial paper, paper made payable to order can only be assigned by indorsement.[3]

Lodge of Freemasons, cannot without express authority make investments in the shape of loans, in order to earn interest, with which to meet the demands upon them for pecuniary aid. It is only intended to indicate that any and every corporation cannot go into the business of discounting commercial paper. See, to the same effect, N. Y. Fireman's Ins. Co. *v.* Ely, 2 Cow. 664; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

[1] See Farmers' & M. Bank *v.* Needles, 52 Mo. 17; Nat. Ins. Co. *v.* Bowman, 60 Mo. 252; City of St. Louis *v.* Shields, 62 Mo. 247; Stoutimore *v.* Clark, 70 Mo. 477; John *v.* Farmers' Bank, 2 Blackf. 367; Snyder *v.* Studebaker, 19 Ind. 462; Vater *v.* Lewis, 36 Ind. 291; Ray *v.* Indianapolis Ins. Co., 39 Ind. 290; Greiner *v.* Ulery, 20 Iowa, 266; Massey *v.* Building Association, 22 Kan. 634.

[2] Farmington S. B. *v.* Fall, 71 Me. 49; Nat. Pemberton Bank *v.* Porter, 125 Mass. 333; McCullough *v.* Moss, 5 Denio, 575; Poock *v.* Lafayette Building Association, 71 Ind. 357.

[3] Planter's Bank *v.* Sharp, 6 How. 301; Bank of Genesee *v.* Patchin

§ 119. **Power of corporations to appoint agents to execute their commercial paper.** — A corporation can only act through its agents, and therefore the power to appoint agents is necessarily implied. If there is nothing in the charter, or in the general laws of the State, restraining this implied power of the corporation, its power is unlimited, and it may appoint any number and kind of agents. But if there be a restriction imposed upon the power, as where the charter or the general laws of the State expressly require that certain corporate acts should be done only by certain agents, the corporation cannot authorize any other agent to act for it in those cases. For example, where a bank charter provided that its commercial paper should be signed by the president and countersigned by the cashier, the corporation would not be bound by a bill or note, signed by the vice-president and assistant cashier, although these officers were authorized by the board of directors to sign for the bank.[1]

Ordinarily, the actual administration of the business of corporations is reposed in a board of directors, and the charter and general laws contain no other restrictions upon the action of the corporation in the appointment of agents. It is very generally held that, in such cases, the power to bind the corporation rests in the board of directors, but that they have the implied power to appoint all the agents that the business of the corporation may require, to whom the power to bind the corporation, originally vested in the board of directors, may be delegated. But, as a general

Bank, 13 N. Y. 309; Marvine *v.* Hymers, 12 N. Y. 223; McIntyre *v.* Preston, 5 Gil. 48; Hardy *v.* Merriweather, 14 Ind. 203; Cooper *v.* Curtis, 30 Me. 488; Savage *v.* Walshe, 26 Ala. 619. From the power to borrow money, may be implied the power to borrow a bill or note, and to indorse the same for negotiation. Lucas *v.* Pitney, 27 N. J. L. 221; Holbrook *v.* Bassett, 5 Bosw. 147; Turniss *v.* Gilchrist, 1 Sand. 53.

[1] Planters', etc., Bank *v.* Irwin, 31 Ga. 377. See also McCullough *v.* Moss, 5 Den. 575; Lucas *v.* San Francisco, 7 Cal. 469.

proposition, no agent, appointed by a board of directors, will have the power to bind the corporation by a note or bill issued in the corporate name, unless the authority is expressly granted to the agent,[1] or it is implied from the appointment of an officer who by general custom and usage has such a power delegated to him.

§ 120. **Implied powers of the bank cashier.** — For example, the cashier of a bank has the general power to bind the bank by his official signature to commercial paper. Not only has he the power to transfer by indorsement the negotiable paper, belonging to the bank, for collection;[2] but he also can indorse such paper for other purposes, *i.e.*, pass title to such paper for a proper consideration.[3] But he is held to have no implied power to transfer the non-negotiable paper of the bank, unless it is proved to have become an established usage for the cashier to make such a transfer.[4]

He has the implied power to borrow money for the bank, and to give the bank's note for it;[5] or to accept a bill in the bank's name;[6] and to certify checks drawn upon the

[1] McCullough *v.* Moss, 5 Den. 575; Odd Fellows *v.* First Nat. Bank, 42 Mich. 463; Preston *v.* Mo., etc., Lead Co., 31 Mo. 45; Cattron *v.* First Universalist Society, 46 Iowa, 106.

[2] Hartford Bank *v.* Barry, 17 Mass. 94; Potter *v.* Merchants' Bank, 28 N. Y. 641; Elliott *v.* Abbott, 12 N. H. 549; Corser *v.* Paul, 41 N. H. 24.

[3] Fleckner *v.* U. S. Bank, 8 Wheat. 357; West St. Louis, etc., Bank *v.* Shawnee, etc., Bank, 95 U. S. 558; Cooper *v.* Curtis, 30 Me. 488; Farrar *v.* Gilman, 19 Me 440; City Bank *v.* Perkins, 29 N. Y. 554; Bissell *v.* First Nat. Bank, 69 Pa. St. 415; Kimball *v.* Cleveland, 4 Mich. 606; Everett *v.* United States, 6 Port. (Ala.) 166; Wild *v.* Passamaquoddy Bank, 3 Mason, 505; Lafayette Bank *v.* State Bank, 4 McLean, 208; Harper *v.* Calhoun, 7 How. (Miss.) 203; State Bank *v.* Wheeler, 21 Ind. 90.

[4] Barrick *v.* Austin, 21 Barb. 241; Holt *v.* Bacon, 25 Miss. 567.

[5] State Bank *v.* Kain, 1 Breese, 45.

[6] Barnes *v.* Ontario Bank, 19 N. Y. 152; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256; Sturgis *v.* Bank of Circleville, 11 Ohio St. 153; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120. But see Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

bank.[1] He also has the implied authority to buy and sell notes and bills for the bank,[2] and to draw bills and checks on the funds of the bank deposited elsewhere.[3]

But, in order to bind the bank by his issue of commercial paper in its name, it must be done in the course of the bank's regular business. He cannot bind the bank as a party to accommodation paper; and such paper can only be enforced against the bank by a subsequent indorsee for value and without notice of its objectionable character.[4]

So, also, has the cashier no implied power to release any one liable to the bank on commercial paper or on any other indebtedness. The power to do so is primarily reposed in the board of directors. But if a cashier should say to the surety or to any one else secondarily liable on the paper, that the indebtedness has been liquidated by the principal, these parties secondarily liable would be relieved of their liability, under the doctrine of estoppel. The bank is estopped from denying the truth of the cashier's statements.[5]

But the implied powers of the cashier do not always inhere to the office of assistant cashier. Thus it has been held that the assistant cashier has not the implied power

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125; Mead *v.* Merchants' Bank, 25 N. Y. 143; Clarke National Bank *v.* Bank of Albion, 52 Barb. 592; Barnes *v.* Ontario Bk., 19 N. Y. 152; Cooke *v.* State Nat. Bank of Boston, 52 N. Y. 96. But see Mussey *v.* Eagle Bank, 9 Met. 306; Morse on Banking, 199, *et seq.* See also *post*, § .

[2] Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. 179.

[3] See Morse on Banks and Banking, 164; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; United States *v.* City Bank of Columbus, 21 How. 356; Merchants' Bank *v.* Central Bank, 1 Kelly, 418.

[4] West St. Louis, etc., Bank *v.* Shawnee, etc., Bank, 95 U. S. 558; Lafayette Bank *v.* State Bank, 4 McLean, 208; Farmers', etc., Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

[5] Cocheco Nat. Bank *v* Haskell, 51 N. H. 110; Merchants' Bank *v.* Rudolf, 5 Neb. 527.

to accept bills or to certify checks.[1] Nor does one, who temporarily fills the office of cashier, in his absence, acquire all the implied powers of the cashier. In the absence of instructions from the board of directors, the substitute can only perform the ordinary and routine duties of the cashier, such as the payment of checks, receipt of payment upon notes and bills held by the bank, and the surrender of such paper when paid.[2]

§ 121. **Implied powers of the president.** — The president of a corporation is its principal executive officer, and in almost every case he represents the corporation. He, therefore, has the implied power to institute suits in the courts in the name of the corporation.[3] And, although it is claimed by a high authority,[4] that by virtue of his office the president of a bank has not the power to draw against the bank's funds, yet it is held in Tennessee that he might legally draw checks or bills of exchange on the funds of the bank, in the absence of the cashier; and he certainly can do so, if it was the general usage of the bank.[5]

The president of a bank has the power to receipt for deposits,[6] and, probably, also, to transfer, in the course of its

[1] Pope *v.* Bank of Albion, 57 N. Y. 126.

[2] Morse on Banking, 167; Potter *v.* Merchants Bk., 28 N. Y. 641.

[3] Alexandria Canal Co. *v.* Swann, 5 How. 83; Mumford *v.* Hawkins, 5 Den. 355; Am. Ins. Co. *v.* Oakley, 9 Paige, 496; Hodge's Exrs. *v.* First Nat. Bank, 21 Gratt, 59; Savings Bank *v.* Benton, 2 Met. (Ky.) 240. But see Ashuelot Mfg. Co. *v.* Marsh, 1 Cush. 507, in which it was held that the president of a manufacturing corporation has not the implied power to bring suits in the name of the corporation.

[4] Morse on Banking, 146.

[5] Neiffer *v.* Bank of Knoxville, 1 Head, 162. See Fulton Bank *v.* N. Y. and Sharon Canal Co., 4 Paige, 127.

[6] Sterling *v.* Marietta, etc., Trading Co., 11 Serg. & R. 170. See also Terrell *v.* Branch Bank, 12 Ala. 502. But if in doing so, the president agrees to pay a larger percentage of interest (Fulton Bank *v.* N. Y. & Sharon Canal Co., 4 Paige, 127), or to charge the bank with any larger liability (Foster *v.* Essex Bank, 17 Mass. 479), than what is usually

ordinary business, the bills and notes held by the bank.[1] But it is settled, beyond all controversy, that neither the president nor the cashier of a bank has any implied power to release any liability due to the bank. This power is vested in the board of directors.[2]

As a general proposition, it may be stated that the president of a corporation is not empowered to bind the corporation by his signature to commercial paper, unless the authority is expressly given to him by the board of directors, or his exercise of the power is continued unquestioned and unrestrained long enough to estop the corporation from denying his authority to sign for it.[3] And if it be the custom of the corporation to permit its president to indorse the negotiable paper payable to it, he will have the implied authority to do so;[4] but in the absence of such a custom, an express authority would be needed to make such an indorsement binding upon the corporation.[5]

Where a president and cashier of a corporation are au-

given in the course of its regular business, he exceeds his powers, and the bank is not liable.

[1] See Leavitt *v.* Connecticut Peat Co., 6 Blatchf. 139; Morse on Banking, 147; Hoyt *v.* Thompson, 1 Seld. 320. In the latter case, the court say: "In Massachusetts, it has been held that neither the president nor the cashier has power *virtute officii*, to transfer negotiable funds, without express authority from the directors. This, however, must be erroneous, if the transfer be made in the usual course of business, and *bona fide*. But it is safe to say that when the sale, assignment or transfer requires the use of the corporate seal, it cannot be made without the assent and authority of the board."

[2] Bank of United States *v.* Dunn, 6 Pet. 51; Bank of Metropolis *v.* Jones, 8 Pet. 12; Cocheco Nat. Bk. *v.* Haskell, 51 N. H. 116; Olney *v.* Chadsey, 7 R. I. 225; Hoyt *v.* Thompson, 1 Seld. 320; Merchants' Bk. *v.* Marine Bk., 3 Gill, 96; Hodges *v.* First Nat. Bk., 22 Gratt. 59; Mt. Sterling Turnpike Co. *v.* Looney, 1 Met. (Ky.) 550; Spyker *v.* Spence, 8 Ala. 333. See *ante*, § 120.

[3] President of a lead mining company; McCullough *v.* Moss, 5 Den. 575.

[4] Elwell *v.* Dodge, 33 Barb. 336;

[5] Marine Bank *v.* Clements, 3 Bosw. 600.

thorized to borrow money on the notes or discounts of the corporation, the agency is a joint one, and the transaction will not be binding upon the corporation unless the two officers named act jointly; although if they do act jointly and concur in a given transaction, the signature of one of them, to the note issued by and with the consent of both, will bind the corporation.[1]

§ 122. **The implied powers of other officers.** — Any other officer of a corporation may be expressly authorized to bind it by his signature to commercial paper. And so, also, any such officer, such as secretary, treasurer, or general agent, may acquire such authority by implication from his more or less extended exercise of the power without question; but except they be authorized in these two ways to so represent the corporation, their signature will impose no obligation on the corporation.[2]

§ 123. **Form of signature by the agents of corporation.** — In determining the proper signature to negotiable paper by an agent of a corporation, the ordinary law of agency applies, so that a proper signature would be in the name of the corporation, followed by the name of the agent who acts for it and in its name. The further requirement would be made that the body of the instrument should run in the name of the corporation, where it is a promissory note, as, for example, "The A. B. Company promise to pay," etc., signed "A. B. Company, by C. D., President, Secretary, Cashier or Treasurer," etc., as the case may be. A paper, executed with this formality, is unquestionably

[1] Morse on Banking, 148; Ridgway *v.* Farmers' Bank, 12 Serg. & R. 256.

[2] First Nat. Bank *v.* Hogan, 47 Mo. 472; N. Y. Iron Mine *v.* First Nat. Bank, 39 Mich. 644; Torrey *v.* Dustin Monument Assn., 5 Allen, 327; Partridge *v.* Badger, 25 Barb.; Blood *v.* Mavense, 38 Cal. 590.

an obligation of the corporation and not a personal obligation of the official who signs the paper. But it very frequently happens that this formality in execution is not observed, and that it is difficult, if at all possible, to determine whether the paper was intended to be a corporate or a personal obligation.

As between the original parties to the contract, it can always in the case of an undisclosed agency be shown who the real principal is; and suit may then be brought against him, instead of against the agent, who appears on the face of the instrument to be the principal. And this is true of agencies for corporations, as well as of other agencies, although the paper should have on its face very slight indications of being a corporate obligation. If there is sufficient appearing on the face to make it doubtful whether it was intended as a personal or as a corporate obligation, parol evidence is admissible to show its true character.[1]

[1] 'It is enough for the purposes of the defendant to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence, to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, namely: that this was the appropriate form of an official check; that it was, in fact, cut out of the official check book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction. * * * It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, first, that the act was done in the exercise, and second, within the limits, of the powers delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act with or without writing, within the scope of the power or confidence re-

And where there is no indication whatever on the face of the paper that it was intended to be a corporate obligation, parol evidence is still admissible to show who the real principal is, and to hold him liable, instead of the agent and supposed principal, if the obligee so elects. But if the obligee prefers to look to the party who is in fact an agent, but appears on the face of the paper to be the principal, parol evidence is not admissible in order to shift the liability to the real principal, the corporation for which he was acting, and to relieve him. The obligee or payee may hold the agent liable in such a case, if he so determines.[1] In

posed in the agent." Mechanics' Bk. of Alexandria *v.* Bk. of Columbia, 5. Wheat. 337. In this leading case, the bill of exchange was as follows: —

MECHANICS' BANK OF ALEXANDRIA,
No. 18. June 25, 1817.
Cashier of the Bank of Columbia:

Pay to the order of P. H. Minor, Esq., ten thousand dollars.
$10,000 WM. PATTON, Jun.

See also, to same effect, Hager *v.* Rice, 4 Col. 94, in which the bill was drawn by a corporation with direction that it be charged to its account, and signed by "Wm. Anderson, President," drawn on and accepted by "T. D. Hager, Treasurer;" McClellan *v.* Reynolds, 49. Mo. 314, in which the note sued on was "I promise to pay," etc., "for building a school house in school district," etc., signed "P. T. Reynolds, Local Director;" Richmond, P. & F. R. R. Co. *v.* Snead, 19 Gratt. 354, where a due-bill was given "in full of labor performed on cottage lot of the R. R. Co," signed by "Ed. Robinson;" Devendorf *v.* W. Va. O. & O. L. Co., 17 W. Va. 172, in which action was brought against the W. Va. Oil and Oil Land Company, on a draft, signed "charge to the account of B. S. Compton, Pres." Parol evidence was admitted to show that this was the customary method for the officers to draw on the funds of the corporation. See also Haile *v.* Peirce, 32 Md. 327; Pratt *v.* Beaupie, 13 Minn. 190.

[1] Hypes *v.* Griffin, 89 Ill. 135. In this case, the note ran "We, the trustees," etc., and was signed by the individuals without any description of official character. The court, per Scott, J., said: "The makers of this note chose to bind themselves individually, under their hands and seals, without the use of any apt words in the agreement to bind the corporation of which they were trustees. Had it been the intention to charge the corporation exclusively, we must understand the agreement would have been expressed in the writing to that effect at the time.

"Were this an action against the corporation, on an agreement in the

determining what amount of evidence is required to appear on the face of the instrument to make it a corporate obligation, instead of the personal obligation of the individuals who execute it, great diversity of opinion will be found in the cases, and it is useless to attempt to reconcile them. On identical, or at least similar, facts, the courts have rendered contradictory decisions, and it is only possible for the writer to state what has been decided, and refer the reader to the conflicting authorities.

It does not often happen that a negotiable instrument is executed by the agent of a corporation in the careful manner indicated above; there is more or less variation from that form in almost every case.

It has been held, perhaps unanimously, that if the instrument runs in the name of the corporation, and signed by the officer, who is authorized to act for the corporation, by merely affixing his official title to his name, it is a good execution of a corporate obligation.[1] It is also a good cor-

individual names of the trustees, a very different question would be presented, and many of the authorities cited would be in point. Some of the cases do hold the well understood doctrine, although the agent may have contracted in his own name, nevertheless, it is competent to show by parol the real facts, and that the contract was made on behalf of the principal, who may also be charged. In such a case, parol evidence is admissible to show as against the indorsee, in what character and at what time one signed his name on the back of the paper, who was not a payee or indorsee and therefore could not be an indorser. See also *ante*, chapter on Transfer by Indorsement.

[1] For example, "The Newport Manufacturing Company promises," etc., and signed "J. W. T., treasurer." See Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. 13; Shotwell *v.* McKown, 2 South. 828; Hall *v.* Auburn Turnpike Co., 27 Cal. 255; Moor *v.* Wilson, 26 N. H. 332; Hall *v.* Crandall, 29 Cal. 567; McGreary *v.* Chandler, 58 Me. 537; Shaver *v.* Ocean Mining Co., 21 Cal. 46; Hopkins *v.* Mehaffy, 11 Serg. & R. 126; Ellis *v.* Pulsifer, 4 Allen, 165; Walker *v.* Wait, 50 Vt. 668. In the following cases, it was stated for what corporation the signer was acting as agent: Jefts *v.* York, 4 Cush. 371; *s. c.* 10 Cush. 392; Dubois *v.* Del. & H. C. Co., 4 Wend. 285; Armstrong *v.* Kirkpatrick, 79 Ind. 527; Johnson School Township *v.* Citizen's Bank, 81 Ind. 515.

porate liability, if the instrument is executed in the name of the corporation by its agent, although the name of the corporation should not appear in the body of the instrument.[1] But where the name of the corporation does not appear either in the body of the instrument or in the signature, and the only evidence on the face of the instrument, that the person signing does not intend to bind himself personally, is the affix to his signature of some designation of agency, as where he signs, A., treasurer, president, or agent, without stating for whom or for what company he is acting; the authorities are unanimous that the instrument creates a personal liability upon the person whose name appears on the paper. The very circumstance that the paper does not disclose even the name of the principal, makes it impossible to treat the instrument as a corporate liability, for in such a case parol evidence would be required to show who the principal was.[2]

[1] As for example, "We (or I) promise to pay," signed "For the Providence Hat Mfg. Co., by F. R.;" Emerson *v.* Providence Mfg. Co., 12 Mass. 237; Ruffin *v.* Mebane, 6 Ired. Eq. 507; Aiken *v.* Marine Bank, 16 Wis. 713; Atkins *v.* Brown, 59 Me. 90; Castle *v.* Belfast Foundry Co., 72 Me. 167; Draper *v.* Mass. Steam Heating Co., 5 Allen, 338; Walker *v.* Bk. of State of N. Y., 9 N. Y. 582; Sanders *v.* Anderson, 21 Mo. 402; Cook *v.* Sanford, 3 Dana, 237; May *v.* Hewitt, 33 Ala. 161; Roney *v.* Winter, 37 Ala 277; Gillet *v.* New Market Sav. Bank, 7 Bradw. 499; Pitman *v.* Kintner, 5 Blackf. 250.

[2] Witte *v.* Derby, 2 Conn. 260; Pease *v.* Pease, 35 Conn. 131; Duvall *v.* Craig, 2 Wheat. 56; Towne *v.* Rice, 122 Mass. 67; Chemung Canal Bank *v.* Supervisors, 5 Denio, 517; Bank *v.* Cook, 38 Ohio St. 442; Jordan *v.* Trice, 6 Yerg. 479; Trustees of Cahokia *v.* Rautenberg, 88 Ill. 219; Thackeray *v.* Hanson, 1 Col. 365. But where the note reads, "We, as trustees, but not individually, promise," etc., without stating for whom the signers are trustees, it has been held that the qualifying words used in the body of the note are sufficient to prevent the attachment of any individual liability: Shoe, etc., Nat. Bk. *v.* Dix, 123 Mass. 148. To such an extreme has this rule been carried, that it has been held to be no material alteration of a negotiable instrument to cut off the words "president," "treasurer," and the like, from the signature. Thackeray *v.* Hanson, 1 Col. 365.

Doubtful ground is reached in the dicussion when the question is raised, whether there is a corporate or individual liability created on a note or bill, where the person signing describes himself as being the agent or representative of a given corporation, but there are no words used, expressly making the instrument the obligation of the corporation. Especially, where the *descriptio personæ* appears in the body of the instrument, as where a note reads, "We, directors of the A. B. Company," etc., the weight of authority is decidedly in favor of holding the paper to bind the signers individually, instead of the corporation, whose directors they are. It is held that the words connecting the name of the corporation with the signers were merely descriptive of the personal identity of those whose names are signed to the paper.[1] And the same rule is followed, where the official title and the name of the corporation are affixed to the signature, for example, "A. B., President of Henderson Loan Co." [2]

[1] Fogg *v.* Virgin, 19 Me. 352; Packard *v.* Nye, 2 Met. 47; Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; Chick *v.* Trevett, 20 Me. 462; Seaver *v.* Colburn, 10 Cush, 324; Dulton *v.* Marsh, L. R. 6 Q. B. 361; Underhill *v.* Gibson, 2 N. H. 352; Bingham *v.* Stewart, 13 Minn. 106; Hypes *v.* Griffin, 89 Ill. 134; Powers *v.* Briggs, 79 Ill. 493. But see New Market Sav. Bank *v.* Gillett, 100 Ill. 254.

[2] Burbank *v.* Posey, 7 Bush, 373; Moss *v.* Livingston, 4 N. Y. 208; McClellan *v.* Robe, 93 Ind. 298; Williams *v.* Second Nat. Bank, 83 Ind. 237; Drake *v.* Flewellen, 33 Ala. 106; Haight *v.* Naylor, 5 Daly, 219; Chamberlain *v.* Pacific Wool, etc., Co., 54 Cal. 103; Heaton *v.* Myers, 4 Col. 627; Barker *v.* Mechanics' Ins. Co., 3 Wend. 94; Sheridan *v.* Carpenter, 61 Me. 107; Smith *v.* Alexander, 31 Mo. 193; Mellen *v.* Moore, 68 Me. 390; Bruce *v.* Lord, 1 Hilt. 247; Scott *v.* Baker, 3 W. Va. 285; Brockway *v.* Allen, 17 Wend. 40; Fiske *v.* Eldridge, 12 Gray, 474; Fowler *v.* Atkinson, 6 Minn. 578; Hayes *v.* Matthews, 63 Ind. 412; Hayes *v.* Brubacker, 65 Ind. 27; Conner *v.* Clark, 12 Cal. 168; Hays *v.* Crutcher, 54 Ind. 260; Pratt *v.* Beaupre, 13 Minn. 187; Rew *v.* Petet, 1 Ad. & El. 196; Tilden *v.* Barnard, 43 Mich. 376; Courtauld *v.* Saunders, 16 L. T. (N. S.) 562. But see, *contra*, Hovey *v.* Magill, 2 Conn. 680; Gaff *v.* Theis, 33 Ind. 307; Schaefer *v.* Bidwell, 9 Nev. 209; Laflin Powder Co. *v.* Sins-

If it were to any extent the custom of persons to furnish the means of identification of themselves by stating in their commercial obligations what their occupation or employment is, then the reason given by the majority of the courts for holding that the affix of an official designation is a mere *descriptio personæ*, and not an indication that the party signing was acting in his official capacity, is a good one, and no objection could reasonably be made with it. But this is by no means a custom, certainly not in the United States; and the appearance in a signature of a man's official title, with the name of the corporation in whose employ he is, leaves upon the popular mind the impression that the signer did not intend to bind himself personally.[1] But the weight of authority is certainly against this position. With the few exceptions mentioned in the last note, the courts hold that "in order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability."[2]

§ 124. **Form of signature by agent of corporation, continued.** —But while it is a very general requirement that words indicating that it is the act of the corporation

heimer, 48 Md. 411; Lazarus *v.* Shearer, 2 Ala. 718: Kennedy *v.* Knight, 21 Wis. 345; Johnson *v.* Smith, 21 Conn. 626.

[1] 1 Parsons' N. & B. 168.

[2] Gray, J., in Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

must accompany the signature and official designation, the later decisions are inclined to accept as sufficient the slightest representation that the person signing is acting for the corporation. Where, therefore, in the body of the instrument, or affixed to the signature, the name of the corporation appears preceded by the words "for the use of," "in behalf of," "on account of," "by order of," and the like, this is very generally held to be sufficient evidence of an intention to create a corporate obligation. Such a paper is generally held to bind the corporation, and not the individual.[1] So, also, has it been held to bind the

[1] *For the use of*, Dow *v.* Moore, 47 N. H. 419; Pearse *v.* Wellborn, 42 Ind. 331; Key *v.* Parnham, 6 Harr. & J. 418. *In behalf of*, Jefts *v.* York, 4 Cush. 371; *s. c.* 10 Cush. 392; Harney *v.* Irvine, 11 Iowa, 82; Haskell *v.* Cornish, 13 Cal. 45; Jones *v.* Clark, 42 Cal. 180; Aggs *v.* Nicholson, 1 H. & N. 165 (25 L. J. Ex. 348). In McHenry *v.* Duffield, 7 Blackf. 41, there was the additional statement "for work done on the N. W. Seminary." "*On account of*," Lindus *v.* Melrose, 3 H. & N. 177. "By order of," New England Ins. Co. *v.* DeWolf, 8 Pick. 56 (1 Am. Lead. Cas. 600). "For," Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237. In Bradlee *v.* Boston Glass Co., 16 Pick. 347, Shaw, Ch. J., said: "The words 'for the Boston Glass Manufactory,' if they stood alone, would perhaps leave it doubtful and ambiguous whether they meant to bind themselves as promisors to pay the debt of the company, or whether they meant to sign a contract for the company, by which they should be bound to pay their own debt, though the place in which the words are introduced would seem to warrant the former construction. But other considerations arise from other views of the whole tenor of the note. The fact is of importance that it is signed by three instead of one, and with no designation or name of office indicating any agency or connection with the company. No indication appears on the note itself that either of them was president, treasurer or director, or that they were a committee to act for the company. But the words 'jointly and severally,' are quite decisive. The persons are 'we the subscribers,' and it is signed Jonathan Hunnewell, Samuel Gore and Charles F. Kupfer. This word 'severally' must have its effect; and its legal effect was to bind each of the signers. This fixes the undertaking as a personal one. It would be a forced and wholly untenable construction to hold that the company and signers were all bound; this would be equally inconsistent with the terms and the obvious meaning of the contract." But see, *contra*, Rice *v.* Gove, 22 Pick. 158.

corporation where the agent or officer signs his name "*as* treasurer [or other officer] for the—— Company."[1] But the decisions are not uniform in this connection, and in the note below will be found cases, which contradict the rule set forth in the text, and hold that such words do not indicate the intention to bind the corporation.[2] On the other

[1] Sanborn *v.* Neal, 4 Minn. 137; Blanchard *v.* Kaull, 44 Cal. 448; Barlow *v.* Congregational Society, 8 Allen, 460; Leach *v.* Blow, 8 Sm. & M. 221; Klosterman *v.* Loos, 58 Mo. 290; Little *v.* Bailey, 87 Ill. 239; Randall *v.* Snyder, 7 Lans. 163; Yowell *v.* Dodd, 3 Bush, 581. In Shoe & Leather Nat. Bank *v.* Doe, 123 Mass. 151, the words were: "We, as trustees but not as individuals," etc.

[2] *In behalf of*, Pomeroy *v.* Slade, 16 Vt. 220; Steele *v.* McElroy, 1 Sneed, 341; Kendall *v.* Morton, 21 Ind. 205; Morrell *v.* Codding, 4 Allen, 403. *By order of*, Caphart *v.* Dodd, 3 Bush, 584. "As," Dennison *v.* Austin, 15 Wis. 366; Titus *v.* Kyle, 10 Ohio St. 444; Bayliss *v.* Pearson, 15 Iowa, 279; Trask *v.* Roberts, 1 B. Mon. 201; Rupert *v.* Madden, 1 Chandl. 146; Stone *v.* Wood. 7 Cow. 453; Paice *v.* Walker, L. R. 5 Ex. 173. In Gadd *v.* Houghton, L. R. 1 Exch. 357, in which action was brought on contract for sale of oranges, "on account of J. M. & Co., Valencia," the case of Paice *v.* Walker was criticised by Lord Justice James as follows: "The case is not, in my opinion, in any way governed by Paice *v.* Walker; for whatever the decision was in that case upon the words 'as agents,' the words in the present case 'on account of,' are not at all ambiguous and it would be impossible to make them words of description. The *ratio decidendi* in Paice *v.* Walker was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of,' another person. Those are the very words of the present case. When a man says that he is making a contract 'on account of' some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to Paice *v.* Walker, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description. The word 'as' seems to exclude that idea. If that case were now before us, I should hold that the words 'as agents' in that case had the same effect as the words 'on account of' in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words, which are intended to be merely words of description, but I do

hand, if a note should read "we *jointly and severally* promise," etc., it will be generally held to indicate that the promisors expected to be bound as individuals, for in no other character could they *severally* promise to pay. Such a note could only be the individual note of the person or persons who signed it.[1] In the same way, it has been held that a note reading "we or either of us," etc., will be the personal note of the parties signing unless there are other circumstances strong enough to overcome the presumption thus raised of its being a personal obligation.[2] So the words "*in solido*" have been held to indicate that the note was an individual obligation of those who signed.[3]

It was also held to be sufficient evidence of the creation of a corporate, instead of an individual, obligation, if the agent of the corporation, in executing the instrument, uses the corporate seal, and designates in the body of the instrument or in the signature his official relation to the corporation;[4] or writes the instrument upon paper, prepared

not think the words 'as agents' were words of description." In Healey *v.* Story, 3 Exch. 3, the note was in form, "We jointly and severally promise," etc., * * * "for and on behalf of the Wesleyan Newspaper Association."

[1] Healey *v.* Story, 3 Exch. 3; Trask *v.* Roberts, 1 B. Mon. 201; Savage *v.* Rix, 9 N. H. 263. But in Rice *v.* Gove, 22 Pick. 158, it was held that the signature *Patton & Johnson for Ira Gove*, "so clearly manifests the purpose to be the execution of a contract binding solely upon the defendant, that if either is to be rejected as surplusage and of no effect, it should be the words 'jointly and severally.'"

[2] Titus *v.* Kyle, 10 Ohio St. 444; Whitney *v.* Sudduth, 4 Metc. (Ky.) 296. In first case the note also contained the clause "*as* directors," etc. But see Harvey *v.* Irvine, 71 Iowa, 82, where it was held that the words "in behalf of," were sufficient to rebut the presumption arising from the use of the expression "we or either of us."

[3] Cooley *v.* Estebau, 26 La. Ann. 515.

[4] Pitman *v.* Kintner, 5 Blackf. 250; Means *v.* Swormstedt, 32 Ind. 87; Aggs *v.* Nicholson, 1 H. & N. 165 (25 L. J. Ex. 348). See 25 and 26 Vict., ch. 89, § 47; Hood *v.* Hallenbeck, 7 Hun. 362. But see, *contra*, Dutton *v.* Marsh, L. R. 6 Q. B. 363.

for the use of the corporation, with the name of the company or of the company's office stamped or printed on its face.[1]

The recital of a consideration moving to the corporation has great weight in determining who is the principal in the transaction; and when it is coupled with an official *descriptio personæ* in the body of the instrument or in the signature, it is usually held to indicate that it is the paper of the corporation.[2] But it is not considered to be very strong evidence of the intention of the parties to bind the corporation; and in a number of cases, the courts have been led to hold that the instrument is the personal obligation of the individual who signs it, although a consideration is recited as moving to the corporation.[3]

In drawing a bill of exchange, it is also quite common for the agent of a corporation to insert into the bill the clause "charge to the account of the ——— company," and sign his own name, merely adding his official title; and this has been frequently held to make the corporation the drawer of the bill.[4] But if the agent does not affix to his

[1] Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Carpenter *v.* Farnsworth, 106 Mass. 561; Lacy *v.* Dubuque Lumber Co., 43 Iowa, 510; Hitchcock *v.* Buchanan, 105 U. S. 416; Wetumpka, etc., R. R. Co. *v.* Bingham, 5 Ala. 657. See, *contra*, Price *v.* Taylor, 5 H. & N. 540; Sewell *v.* Derbyshire Ry. Co., 9 C. B. 811; Fitch *v.* Lawton, 6 How. (Miss.) 371. In Cooley *v.* Esteban, 26 La. Ann. 515, the note ran "We, the undersigned, bind ourselves to pay *in solido*."

[2] Chipman *v.* Foster, 119 Mass. 189; Horton *v.* Garrison, 23 Barb. 176; McHenry *v.* Duffield 7 Blackf. 41; Haskell *v.* Cornish, 13 Cal. 45; McClellan *v.* Reynolds, 49 Mo. 313.

[3] Haverhill Mut. Ins. Co. *v.* Newhall, 1 Allen, 130; Clark *v.* Trevett, 20 Me. 262; Cleveland *v.* Stewart, 3 Ga. 283; Wiley *v.* Shank, 4 Blackf. 420; Blakely *v.* Bennecke, 59 Mo. 193; Anderson *v.* Pearce, 36 Ark. 293.

[4] Olcott *v.* Tioga R. R. Co., 40 Barb. 179; *s. c.* 27 N. Y. 546; Safford *v.* Wyckoff, 1 Hill, 11; 4 Hill 442; Maher *v.* Overton, 9 La. 115, Fuller *v.* Hooper, 3 Gray, 334; Sayre *v.* Nichols, 7 Cal. 535; Gillig *v.* Lake Bigler R. R. Co., 2 Nev. 214; Whitte *v.* Derby Fishing Co., 3 Conn. 435; Slawson *v.* Loring, 5 Allen, 313. See, *contra*, Tucker *v.* Fairbanks, 98 Mass. 101.

signature his official title, as agent of the corporation, the insertion in the bill of such clauses will not make the bill the obligation of the corporation.[1]

§ 125. **Form of acceptance by agent of corporation.** — The drawee named in the bill of exchange is the only person who can accept the bill, except for honor *supra protest;*[2] and if a bill is drawn on an individual, he cannot accept as the agent of a corporation by writing the name of the corporation across the bill. If such an attempt were made, the writing across the face of the bill would not constitute the acceptance. It could not be the acceptance of the corporation, for the bill was not drawn on it; and it could not be the acceptance of the person on whom it was drawn, for he did not accept in his individual capacity.[3] On the other hand, if the bill is drawn on the

[1] Bank of British N. A. *v.* Hooper, 5 Gray, 567; Kean *v.* Davis, 1 N. J. 683; Leadbetter *v.* Farrow, 5 Maule & S. 345; Newhall *v.* Dunlap, 14 Me. 182; Snow *v.* Goodrich, 14 Me. 235. In Bass *v.* O'Brien, 12 Gray, 477, where the bill contained the clause "charge the same to account of disbursements of bark Dublin," and was signed by the master of the vessel, without any official designation, Bigelow, J., said: "The owners were clearly not liable as drawers of the draft. It does not purport on the face to bind them. Peterson did not sign it as master or as agent of the owners, or otherwise indicate that he drew it in a representative capacity. The direction to charge the amount to the disbursements of bark Dublin was only a designation of the account to which the payment was to be debited when the draft was taken up by the drawees, but did not in any way disclose the persons who were ultimately responsible for such disbursements. The rule is well settled that when an agent signs negotiable paper in his own name, without disclosing his principal, the agent only is liable, and evidence *dehors* the instrument cannot be resorted to for the purpose of showing that it was given for or on account of some other person. Whoever takes negotiable paper enters into a contract with the parties who appear on the face of the instrument, and can not look to other persons for payment."

[2] See *post*, § 219.

[3] Walker *v.* Bank of the State, 9 N. Y. 582. But see More *v.* Charles, 5 El. & B. 978, where it was held that an attempt to bind the corporation by an acceptance, where the bill was drawn on the individual personally,

corporation by name, and the authorized agent accepts for the corporation by writing his own name across the bill, merely affixing his official title, it will be a good acceptance by the corporation, for the corporation only can accept. There is therefore no doubt of the character in which the individual who signs is acting.[1]

In order, therefore, to determine who can accept, it must be ascertained who the drawee is. And in determining whether the bill is drawn on a corporation or on individuals, described as agents of the corporation, the rule, already explained in reference to the execution of bills and notes, is found to be very strictly followed; and where a bill is drawn on an individual by name, with his official designation affixed, without other words to indicate that his name is mentioned as the representative of the corporation, the bill is held to be drawn on the person in his personal capacity, and he cannot bind any one but himself by his acceptance.[2] But where there are other indications, appearing on the face of the instrument that the drawer intended to draw on the corporation, instead of on the agent, whose name is mentioned, the courts will hold, as

would be a good acceptance by that individual. See also to same effect, Herald *v.* Connah, 34 L. T. (N. s.) 885.

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604; Alabama Coal Mining Co. *v.* Brainard, 35 Ala. 479. But see, *contra*, Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

[2] Thomas *v.* Bishop, Chitty Jr. 278; 2 Stra. 955; 7 Mod. 180; Nichols *v.* Diamond, 24 E. L. & Eq. 405 (9 Exch. 154); Bruce *v.* Lord, 1 Hilt. 247; Moss *v.* Livingston, 4 Comst. 208; Slawson *v.* Loring, 5 Allen, 341. In Exch. Nat. Bank *v.* Third Nat Bk., 4 Fed. Rep. 20, and Laflin & Rand Powder Co. *v.* Sinsheimer, 48 Md. 411; Hager *v.* Rice, 4 Col. 90, it was held to be admissible in such cases to show by parol evidence, as between the payee and acceptor, that the bill was drawn on the corporation and not on the individual; who is named as drawee and described as the agent of the corporation. But see Shelton *v.* Darling, 2 Conn. 435; Amison *v.* Ewing, 2 Cold. 367, in which it is held that such a *descriptio personæ* is to be taken as an intention to draw on the corporation, and not on the individual whose name is mentioned.

in the case of the execution of bills and notes, that the corporation is the intended drawee. And this is true, not only where an independent person draws on the corporation, but also where one officer of the corporation draws on another officer of the same corporation. It has thus been held to be sufficient evidence of the intention in such cases to act in an official, instead of in a personal, capacity, that the official designations are added to the names of the drawer and drawee, and the bill written on blanks, containing the name of the corporation, or dated from its office.[1]

§ 126. **Form of indorsement by agent of corporation.** As the designation of the drawee indicates the proper form of acceptance, so the designation of the payee indicates the proper form of indorsement. If, under the rules, previously laid down here in reference to the execution of bills and notes by the agents of corporation, the bill or note is made payable to an individual in his personal capacity, he

[1] Olcott *v.* Tioga R. R. Co., 40 Barb. 179; *s. c.* 27 N. Y. 546; Fuller *v.* Hooper, 3 Gray, 334; Chipman *v.* Foster, 119 Mass. 189; Wetumpka, etc., R. R. Co. *v.* Bingham, 5 Ala. 657; Gillig *v.* Lake Bigler R. R. Co., 2 Nev. 214; Sayre *v.* Nichols, 7 Cal. 535. But see, *contra*, Slawson *v.* Loring, 5 Allen, 341. In that case, the bill was headed "Office Portage Lake Manufacturing Co.," and was addressed, in printed capitals, "E. T. Loring, Agent." It was signed "Charge the same to the account of this company, I. R. Jackson, Agent." After stating that the heading of the bill could only be considered as a disclosure of the real drawer, and the principal of Jackson, Bigelow, J., said: "What then is left on the face of the paper to show that the defendant is not liable as acceptor? Nothing except the single circumstance that the address to him as drawee is printed in large capital letters at the top of the instrument, with the addition thereto of the word agent. This certainly does not necessarily, or even *prima facie*, indicate that he is the agent of the drawers. It is, to say the least, equally consistent with the idea that he is the agent of some third person not named on the face of the bill. Nor can we give any great effect to the fact that the defendant's name as drawee is printed as part of the blank used by the company. A draft or bill in like form might be used, if their course of business was to deal with him as the agent of some other person or company."

cannot, by indorsing it in the name of the corporation, bind the corporation as an indorser; and if the corporation is liable at all on this signature, it will be as a guarantor.[1] Merely adding to the payee's name an official designation, describing him as the agent of a corporation, will not make the corporation the payee.[2] But if the bill or note is made payable to the corporation in proper form, the indorsement by the proper officer of the corporation by his own signature, with official designation, will bind the corporation.[3]

§ 127. **Exceptions as to cashiers of banks.**— It has become a common custom to make commercial paper payable to the cashier of a bank, sometimes not stating of what bank he is the cashier; and it has been uniformly held in all such cases that the bank and not the cashier is the right party to sue on it.[4] And if the cashier indorses such paper, with his official title, the bank, and not he, will be bound by the indorsement.[5] In the same manner, if a bill is drawn on

[1] See *post*, chapter on Transfer by Indorsement.

[2] Buffum *v.* Chadwick, 8 Mass. 103; Vater *v.* Lewis, 36 Ind. 288; Chadsey *v.* McCreery, 27 Ill. 253. But see, *contra*, Babcock *v.* Beman, 1 Ker. 209.

[3] Northampton Bank *v.* Pepoon, 11 Mass. 288; Elwell *v.* Dodge, 33 Barb. 336.

[4] Baldwin *v.* Bk. of Newburg, 1 Wall. 234; Stanford Bank *v.* Ferris, 17 Conn. 259; Barney *v.* Newcomb, 9 Cush. 46; Hartford Bank *v.* Berry, 17 Mass. 94; Barbour *v.* Litchfield, 4 Abb. App. 655; Erwin *v.* Branch Bank at Mobile, 14 Ala. 307; First Nat. Bank *v.* Hall, 44 N. Y. 395; Bank of N. Y. *v.* Bk. of Ohio, 29 N. Y. 619; Watervliet Bank *v.* White, 1 Denio, 613; Folger *v.* Chase, 18 Pick. 63.

[5] In Folger *v.* Chase, 18 Pick. 67, the court said: "As to the objection that the indorsement is not made in the name of the corporation, we think that the indorsement by the cashier in his official capacity sufficiently shows that the indorsement was made in behalf of the bank, and if that is not sufficiently certain the plaintiffs have the right now to prefix the name of the corporation." See, to the same effect, Bank of Genesee *v.* Patchen Bank, 13 N. Y. 309; *s. c.* 19 N. Y. 313; Bank of State of N. Y. *v.* Muskingum Branch, 29 N. Y. 319· State Bank *v.* Fox, 3 Blatchf. 431;

the cashier of a bank by name, and he accepts in his official character, the bank will alone be bound by the acceptance.[1] This method of signature by the cashier of a bank in acceptances and indorsements is uniformly held to be proper, although in contravention of the general rule of law, which requires the contracts made by agents to run in the name of the principal, in order to bind the latter.[2]

§ 128. **Drafts or warrants of one corporate officer upon another.** — It is a comparatively common custom, in the dealings of a private corporation, for one of its officers, its president or secretary, for example, to draw on the treasurer in favor of some person to whom the corporation has become indebted. If the draft or warrant contains all the other essentials of negotiable paper, there can be no doubt that it possesses all the characteristics of negotiability, and is to be considered as a bill of exchange, in which the same person is both drawer and drawee; and such a warrant may, like all other such irregular instruments,[3] be treated either as an accepted bill or as a promissory note. Since in these cases the drawee is the same person who draws — although through a different agent — it has been generally held that it is not necessary in order to hold the corporation liable for the payee or holder to make a formal

Northampton Bank *v.* Pepoon, 11 Mass. 288; Watervliet Bank *v.* White, 1 Denio, 609; Collins *v.* Johnson, 16 Ga. 458; Robb *v.* Ross Co. Bank, 41 Barb. 586; Elwell *v.* Dodge, 33 N. Y. 336; Bank of the State *v.* Wheeler, 21 Ind. 90; Mechanics' Banking Assn. *v.* N. Y. & S. White Lead Co., 35 N. Y. 505; Houghton *v.* First Nat. Bank, 26 Wis. 663.

[1] Farmers', etc., Bank *v.* Troy City Bank, 1 Dong. (Mich.) 473.

[2] Fleckner *v.* U. S. Bank, 8 Wheat. 338; Burnham *v.* Webster, 19 Me. 232; Corser *v.* Paul, 41 N. H. 24; Folger *v.* Chase, 18 Pick. 63; Houghton *v.* First Nat. Bank, 26 Wis. 663. In Elwell *v.* Dodge, 33 N. Y. 336, the same ruling was made in regard to the indorsements of the president of a bank.

[3] See *ante*, § 20.

presentment on the officer on whom the paper is drawn, or to give notice of non-payment.[1]

[1] Shaw *v.* Stone, 1 Cush. 256; Fairchild *v.* Ogdensburg, etc., R. R. Co., 15 N. Y. 337; Allen *v.* Sea Fire & Life Ins. Co., 9 C. B. 574; Hasey *v.* White Pigeon Beet Sugar Co., 1 Doug. (Mich.) 193; Dennis *v.* Table Mountain Water Co., 10 Cal. 369; Indiana, etc., R. R. Co. *v.* Davis, 20 Ind. 6; Manx Ferry Gravel R. Co. *v.* Branegan, 40 Ind. 361, overruling the earlier cases of Marion, etc., R. R. Co. *v.* Dillon, 7 Ind. 404; Marion *v.* Logansport R. R. Co., 7 Ind. 648; Marion, etc., R. R. Co. *v.* Hodge, 9 Ind. 163. In Marion, etc., R. R. Co. *v.* Dillon, *supra*, Perkins, J., said: "If a man drew a bill or order directly upon himself payable immediately, it is his promissory note, and may be sued on accordingly. In such case he is the payer as well as drawer, and by the very act of drawing admits he is to pay, and that he has not then the money with which to make payment. But where the debt is due from a company, and it is the duty of one officer or set of officers to allow demands, and draw upon another officer who has the custody and is charged with the duty of the disbursement of the company's funds for payment, such order must, as a general rule, be presented in a reasonable time for payment." See also, *contra*, Wetumpka, etc., R. R. Co. *v.* Bingham, 5 Ala. 663.

CHAPTER VIII.

GOVERNMENTS AND MUNICIPAL CORPORATIONS AS PARTIES TO COMMERCIAL PAPER.

SECTION 132. Governments as parties.
133. Municipal or public corporations as parties.
134. How far their obligations are negotiable.
135. What agents are authorized to bind the corporation.
136. Whether unauthorized agents are personally liable.
137. Form of signature by public agents.
138. Drafts, or warrants of one officer on another, whether negotiable.
139. Indorsement or assignment of corporate drafts or warrants.
140. Presentment of warrants for payment.
141. Warrants payable out of particular fund.
142. Suit on original indebtedness.

§ 132. **Governments as parties.**—Except so far as the power of the government may be restricted by constitutional limitations, there can be no doubt that both the State and Federal governments may by their duly authorized agents become parties to any species of commercial paper,[1] either as drawer, maker or acceptor.[2] And the power of foreign governments to become parties to commercial paper has also been recognized by the Supreme Court of the United States.[3] But since governments do not, in the reg-

[1] As to the power of either government to emit bills of credit, see *post*, chapter on Bank Notes, Treasury Notes and Bills of Credit.

[2] United States *v.* Bank of Metropolis, 15 Pet. 377; United States *v.* Central Nat. Bank, 6 Fed. Rep. 134; State ex rel. Plock *v.* Cobb, 64 Ala. 156.

[3] Jones, indorsee, *v.* Le Tombe, 3 Dall. 384. In this case, Le Tombe, the French Consul-general at Philadelphia, drew on the French government, and in an attempt by an indorsee to hold the consul liable, the court held that he was not personally liable, since he acted only in his official capacity.

ular and ordinary administration of public affairs, require the exercise of this power, it would not be proper or legitimate for the courts to recognize in any officer of the government an implied power to bind the government by his execution of a bill or note. Only under an express power, granted by the legislative department of the government, can an officer of the government claim authority to issue commercial paper in its name except so far as the power to issue commercial paper, or to make the government a party to it, may be implied as being necessary to carry out some express power. This ruling has been definitely settled in this country by the decision of the Supreme Court of the United States in the case of the Floyd Acceptances.[1]

In this case it was held that no officer of the United States government has the implied authority to bind the government by his acceptance of a bill in his official capacity, although it can be shown by extraneous evidence, as well as on the face of the bill, that the bill was accepted, in order to provide supplies for an acknowledged public purpose. In the course of the opinion of the court, Miller, J., said: —

"Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that

[1] 7 Wall. 667. In this case, suit was brought upon the following instrument: —

$5,000. WASHINGTON, Nov. 28, 1859.

Ten months after date, for value received, pay to our own order, at the Bank of the Republic, New York city, Five Thousand Dollars, and charge to account of our contract for supplies for the army in Utah.

To HON. J. B. FLOYD, *Secretary of War.* RUSSELL, MAJORS & WADDELL.

(Indorsement). Russell, Majors & Waddell.

(Acceptance.) War Department, Nov. 28, 1859. Accepted. JOHN B. FLOYD, *Secretary of War.*

there is no express authority to any officer of the government to draw or accept bills of exchange. * * *

"The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry; and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

"It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule than a private individual. * * *

"In accordance with these views, we are of the opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers or agents to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government."[1]

§ 133. **Municipal or public corporations as parties.** — A distinction is sometimes made between municipal and pub-

[1] Miller, J., in the Floyd Acceptances, 7 Wall. 679–681.

lic corporations, and Judge Dillon, in his work on Municipal Corporations, says: "The term municipal corporation has reference to incorporated villages, towns and cities, as distinguished from other public corporations, such as counties and *quasi* corporations."[1] But although an attempt has been made to show the contrary,[2] the only essential difference between them is the relative quantity of powers, conferred by the State government upon each. Cities, towns, villages, counties, parishes, school and police districts, all these public corporations are instituted for the purpose of establishing some form of local government. Upon some are conferred more extensive powers than upon others, but each of them is invested, either expressly or by necessary implication, with all the powers necessary to carry out the purposes of its existence. Not only are the powers of a county or school district more restricted than those of a city or town, but the powers of city and town government vary very materially with the provisions of their charters.

[1] Dillon Mun. Corp., § 10.

[2] "A municipal corporation has for its object the interests, advantage and convenience of the locality and its people. A county organization is intended to subserve the policy of the State at large in such matters as finance, education, provision for the poor, military organization, means of travel and transport, and especially the administration of justice. A municipal corporation is a government, possessing powers of legislation, and is charged with a general care for the welfare of the people; while a county organization is merely the involuntary agent of the State, charged with the interests of the State in the particular county, and clothed with certain administrative functions, limited in extent and clearly defined by law. There is, of course, some analogy between the two classes of corporation. They are parts of the same political system. They differ in dignity and in power. Each has such implied powers as are necessary for the execution of its powers expressly granted. But it must be apparent that the implied powers of a municipal corporation are not to be measured by those of a mere public corporation, such as a parish, township, or county. There is little analogy between the powers of the councils of a great city, and those of the supervisors of a petty township, or the public jury of a parish." Paxson, J., in City of Williamsport *v.* Commonwealth, 84 Pa. St. 499.

In every case, therefore, of the creation of a public or municipal corporation, the legislature by its express enactment, either by special acts or under general laws, determines the powers of these corporations. All such corporations, whether city or county, town or school district, can exercise only such powers as are expressly granted by legislative enactment, or which are necessarily implied, in order to exercise the powers expressly granted or to carry out the purposes of their creation.[1]

The question then arises, can a municipal corporation, through its authorized agent, lawfully become a party to commercial paper? This question is only difficult to answer when there is no express grant of power, and the power, if it exists at all, must be implied. Unless some provision of the State constitution intervenes, it cannot be doubted that the State legislature may grant such a power to any municipal or public corporation. The cases, in which this question called for an answer, are at variance, some holding that the municipal corporation has such an implied power,[2]

[1] "It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Minturn *v.* Larne, 23 How. 435, 436. "Boroughs and towns are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the State, but their authority is delegated, and their powers must be strictly pursued. Within the limits of their charter, their acts are valid; without it, they are void." Willard *v.* Killingworth, 8 Conn. 247; Thompson *v.* Lee Co., 3 Wall. 320; Thomas *v.* Richmond, 12 Wall. 349; Merriam *v.* Moody's Executors, 25 Iowa, 163; Nichol *v.* Mayor, 9 Humph. 252; Leonard *v.* Canton, 35 Miss. 189; Douglass *v.* Placerville, 18 Cal. 643; Wallace *v.* San Jose, 29 Cal. 180; Smith *v.* Madison, 7 Ind. 86; Memphis *v.* Albany, 9 Heisk. 518 (24 Am. Rep. 331).

[2] City of Williamsport *v.* Commonwealth, 84 Pa. St. 487; Sturtevant *v.* City of Alton, 3 McLean, 393; Mullerty *v.* Cedar Falls, 19 Iowa, 21;

while others deny that the public and municipal corporations have such a power.[1]

There are two sub-questions involved in this discussion: *First*, whether a public or municipal corporation has an implied power to borrow money, and bind the community by the obligation thus assumed, or whether such a corporation can only obtain funds by means of taxation. *Secondly*, whether, if the implied power to borrow money be conceded, it includes the power to give in evidence of the money borrowed a negotiable note or bill.

In reference to the first question, the authorities are divided. It is urged in behalf of the denial to such corporations of any implied power to borrow, that public and municipal corporations are established for purposes of local government, and the ordinary means by which such purposes may be carried on can be procured by the exercise of the governmental power of taxation. That being in ordinary cases a sufficient source of revenue, there is no reason why the power to borrow should be implied. For powers are only implied, when they are necessary to attain the ordinary purposes for which these corporations are created. If an extraordinary public benefit is suggested to be needful to any community, but which can be secured only by the exercise of the power to borrow, the legislature can be asked for a special grant of the power.[2] But, it must be confessed that

City of Galena *v.* Corwith, 48 Ill. 423; Mills *v.* Gleason, 11 Wis. 470; Bank of Chillicothe *v.* Mayor of Chillicothe, 7 Ohio, pt. II., p. 31; Ketchum *v.* City of Buffalo, 14 N. Y. 356.

[1] Mayor *v.* Ray, 19 Wall, 468; Police Jury *v.* Britton, 15 Wall. 566; Commissioners of Shawnee County *v.* Carter, 2 Kan. 115; Marcy *v.* Township of Oswego, 92 U. S. 637; Humboldt Township *v.* Long, 92 U. S. 642. See cases cited in succeeding notes.

[2] See, in support of this position, the opinion of Beasley, Ch. J., in Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Agnew, C. J., dissenting in Williamsport *v.* Commonwealth, 84 Pa. St. 487, 505; Knapp *v.* Hoboken, 39 N. J. L. 394; Gause *v.* Clarksville, 5 Dillon C. C. 165; Dillon's Municipal Corporations, §§ 117–127. The following opinion of

however strong in point of reason this position may be, it is not supported by the majority of the cases. The current of judicial authority is in fact running in favor of the opposite view, viz.: that a municipal corporation, like a private corporation, may exercise any power that is suitable or needful to the effectuation of the objects for which it is created.[1]

Bradley, J., in Mayor of Nashville *v.* Ray, 19 Wall. 475, undoubtedly constitutes the strongest argument that can be advanced in favor of this view. The justice says: —

"A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only, and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities and its powers are different; as a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such power as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the law; its burden is not felt until afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans, such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." Bradley, J., in Mayor *v.* Ray, 19 Wall. 475. Although the conclusion reached in this opinion was made the judgment of the court, one-half of the members of the court dissented from the opinion that there was no implied power to borrow.

[1] The case of Williamsport *v.* Commonwealth, 84 Pa. St. 487, is a

The power to borrow money is held to be implied, not only when there has been no express grant of such a power, but also when this power has with limitations been ex-

leading case on this subject. In delivering the opinion of the court, Paxson, J., said (p. 494): "Taken in its broad sense, the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation. For general purposes such power does not exist, for the reason that it is not necessary for the objects for which it was created. Thus it has never been contended that a municipality may borrow money and issue bonds or notes for objects having no necessary relation to the performance of municipal duties. To admit such a principle would be destructive of such organization and place the taxpayers of a city at the mercy of the first band of plunderers who should happen to obtain the temporary control of its affairs. The question for our consideration is whether the power to issue bonds is one of the inherent powers of a municipal corporation in a limited sense; that is to say, for the purpose of providing for such expenditure as is strictly genuine to the objects for which such corporations are created, we are not without authorities that question, if they do not deny this power. Judge Dillon, one of the ablest writers upon this branch of law, says in his treatise on the Law of Municipal Bonds, at page 13: 'We regard, as alike unsound and dangerous, that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes, and as incidental to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is towards the view above indicated.' The ground principally relied upon by the learned author and others who take this view of the question, is that the power is a dangerous one. But showing that the power is dangerous does not prove that it does not exist. Power is always dangerous * * * The dangerous nature of a power might be a persuasive argument with the legislature why it should be denied to a municipal corporation, but cannot be accepted as a conclusive reason that it does not exist. I am willing to concede that the power to issue municipal bonds is dangerous. It affords opportunities to unscrupulous men, hungering for the spoils of rich municipalities, to enter into extravagant contracts, at ruinous prices, by mortgaging the resources of the people in advance. The facility of placing municipal bonds, at high rates of interest, and having many years to run is certainly a great inducement in many cases to unwise and lavish expenditure. It might have been better for the legislature in the first instance to have applied the principle 'pay as you go' to such corporations; and to have required them to seek legislative sanction whenever they sought to incur obligations and make expenditures beyond their ability to pay out of their current

pressly granted, and it seems to be necessary to make use of the power beyond the limits imposed in the express grant of the power; as where a city charter expressly grants to the municipal corporation the power to borrow whatever money it may need, not exceeding a certain sum per year, and to issue bonds for the same. It was held in Illinois that under the implied power to borrow money, the city may lawfully borrow more money than what is stated in the charter.[1] This is certainly carrying the doctrine of

receipts from taxation. This, however, is a question with which we have no present concern. Our duty is to declare the law not to make it." See, to the same effect, Bank of Chillicothe *v.* Mayor of Chillicothe, 7 Ohio, Pt. II., p. 31; Douglass *v.* Virginia City, 5 Nev. 147; Sturtevant *v.* City of Alton, 3 McLean, 393; Mullarky, *v.* Cedar Falls, 19 Iowa, 21; New Albany Bank *v.* Danville, 60 Ind. 504; Sheffield *v.* Andress, 56 Ind. 157; Galena *v.* Corwith, 48 Ill. 423; Board *v.* Day, 19 Ind. 450; Mells *v.* Gleason, 11 Wis. 470; Ketchum *v.* City of Buffalo, 14 N. Y. 356; Kelly *v.* Mayor of City of Brooklyn, 4 Hill, 263; Clarke *v.* School District, 3 R. I. 199; First Municipality of New Orleans *v.* McDonough, 2 Robinson, 244; Clarke *v.* City of DeMoines, 19 Iowa, 199; Adams *v.* Railroad Company, 2 Coldw. 645. Under the English Municipal Corporations Act, the issue of bonds for loans to such corporations has been held to be valid: Pallister *v.* Mayor, etc., 67 Eng. C. L. (9 C. B.) 744; Payne *v.* Mayor, etc., 3 Hurl. & N. 572. See also Kendall *v.* King, 84 Eng. C. L. (17 C. B.) 483; Nowell *v.* Mayor, etc., 9 Exch. 457. But the issue of promissory notes was held to be invalid under that act: Attorney-General *v.* Litchfield, 13 Sim. 547; Reg *v.* Litchfield, 4 Q. B. 893.

[1] Breese, Ch. J. said: "One single question will, we think, settle the present difficulty. The power in the charter to borrow money permits it to be expended in the useful and permanent improvement of the city. Now suppose the whole amount [$20,000 per year] is borrowed, and all expended in improvements, has the city no power to provide for its existing debt, which may be twice $20,000? * * * Every corporation or every natural person has the undeniable and inherent right to pay its debts or provide for their payment; to fund them if that be deemed the best policy, and issue the necessary evidence thereof. It will not be denied that municipal corporations have power to contract debts and without limit unless restricted by their charters. Having this power, it follows that they can provide for their payment in such mode as they and the holders of the indebtedness may agree upon. * * * The right bestowed by the charter to borrow by no means nullifies the power, vital to every corporation, to pay its debts or provide for their payment by

implied powers to the extreme limits of constitutional and statutory construction. The general rule of construction is, that the express grant of a power with limitations necessarily excludes any implication of such a power beyond the limitation.[1]

It may be well to state, that the implied power to borrow money was in this country conceded to, and exercised by, municipal corporations for many years, before it was seriously questioned. And it is very probable that it would not have been questioned, if the municipalities had not entered upon a career of reckless expenditure of the public funds and credit in the development of internal improvements.

§ 134. **How far their obligations are negotiable.** — The second subsidiary question in this discussion is: Conceding the power to borrow money, can the municipal corporation issue, as evidences of its indebtedness, negotiable instruments, which will not only be assignable from one person to another, but which enable the indorsee to hold the indorser liable as a guarantor, and to take the instruments free from the equitable defenses, that can be set up by the corporation against the original payee, but which do not appear on the face of the instruments.[2] The author-

postponing their payment to a future day, and issuing evidences thereof. We do not think the citation of any authority necessary to establish a proposition so plain. A city being in debt, which is evidenced by scrip or promissory notes, may surely change the form of the indebtedness to interest bearing bonds, and this without any express authority in its charter. It is an inherent power and vital, without which such organizations could not live." City of Galena *v.* Corwith, 48 Ill. 423.

[1] It has been held by the Supreme Court of the United States that when the charter expressly grants the power to borrow a certain sum *for general* purposes, it does not deny or take away the implied power to borrow in excess of that amount for special *authorized* purposes. Hitchcock *v.* Galveston, 96 U. S. 341; United States *v.* Fort Scott, 99 U. S. 152.

[2] For the detailed application of this question to corporate securities, see *post*, chap. XXV., on Coupon Bonds.

ities seem to be agreed that if the legislature *expressly* grants the power to borrow money, the corporation may issue therefor its negotiable instruments of indebtedness.[1] But the authorities, which question the existence of an implied power to borrow money, deny that in any case, where the implied power must be conceded to exist, it is necessary to include in the concession the power to issue negotiable securities. The claim is made that the latter power is not necessary to the full exercise of the power to borrow money, and should, therefore, not be implied.[2] But this is

[1] Seybert *v.* Pittsburg, 1 Wall. 272; Rogers *v.* Burlington, 3 Wall. 654, 666; Commonwealth *v.* Pittsburg, 34 Pa. St. 496, 511; Middleton *v.* Allegheny Co., 37 Pa. St. 241; Reinboth *v.* Pittsburg, 41 Pa. St. 278; Railroad Co. *v.* Evansville, 15 Ind. 395, 412; De Voss *v.* Richmond, 18 Gratt. 338; *s. c.* 7 Am. Law Reg. (N. S.) 589; Galena *v.* Corwith, 48 Ill. 423.

[2] "The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power (of issuing commercial paper). They are not trading corporations, and ought not to become such. They are invested with public trusts of a governmental and administrative character: they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order, and general well-being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such a character as to be irretrievably binding on the people, without a shadow of consideration in return is the growth of a modern misconception of their true object and character. If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake.

"Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kinds used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes.

not true. If the instruments which a municipal corporation can issue as evidence of their indebtedness, incurred under the implied power to borrow, are subject in the hands of a *bona fide* holder to the defect of every hidden defense that may be set up against the original payee, the money cannot be borrowed so readily, or on such reasonable terms. Higher rates of interest or discounts would be demanded as an inducement to lend to such corporations. It would seem that the power to issue the negotiable instrument as an evidence of indebtedness is as necessary or serviceable to the municipal or public corporation, as it is to the private corporation or the natural person.[1]

But to invest such documents with the character and incidents of commercial paper, so as to make them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment either expressed or clearly implied." Bradley, J., in Mayor *v.* Ray, 19 Wall. 476, 477. See, to the same effect, Beasley, Ch. J., in Hackettstown *v.* Swackhamer, 37 N. J. L. 191; Agnew, Ch. J., dissenting opinion, in Williamsport *v.* Commonwealth, 84 Pa. St. 487, 505; Knapp *v.* Hoboken, 39 N. J. L. 394; Gauss *v.* Clarksville, 5 Dill. C. C. 165.

[1] Barry *v.* Merchant's Express Co., 1 Sandf. Ch. 280; Curtis *v.* Leavitt, 15 N. Y. 9, 62; Smith *v.* Law, 21 N. Y. 296, 299; Ketchum *v.* Buffalo, 14 N. Y. 356; Douglass *v.* Virginia City, 5 Nev. 147; Municipality *v.* McDonough, 2 Rob. (La.) 242, 250; Bank of Chillicothe *v.* Chillicothe, 7 Ohio, Part II., p. 31; Sturtevant *v.* City of Alton, 3 McLean, 393; Mullarky *v.* Cedar Falls, 19 Iowa, 21; Galena *v.* Corwith, 48 Ill. 423; Mills *v.* Gleason, 11 Wis. 470; Clarke *v.* School District, 3 R. I. 199; Adams *v.* Railroad Company, 2 Coldw. (Tenn.) 645; Clark *v.* Des Moines, 19 Iowa, 199. "The foregoing cases rest upon the principle, which we think a sound one, that where a municipal corporation has lawfully contracted a debt, it has the implied power, unless restricted by its charter or prohibited by statute, to evidence the same by a bill, bond, note, or other instrument; that the power to contract a debt carries with it by necessary implication the right to give an appropriate acknowledgment of such debt, and to agree with the creditor as to the time and mode of payment;

But it must be borne in mind that only the *bona fide* holder of commercial paper can claim to hold it free from equitable and other defenses not appearing on the face of the paper. No one is or can be a *bona fide* holder, who has sufficient notice of defenses to put him on his inquiry into their character. When, therefore, a municipal or public corporation by its ordinance directs the issue of a certain amount of negotiable securities, the ordinance being a public law, all those who purchase the securities are charged with notice of whatever appears in the ordinance or in the charter, which shows the issue of the securities to be beyond the authority of the corporation. For no one can take such securities as a *bona fide* holder.[1]

§ 135. **What agents are authorized to bind the corporation.** — It is very well known that the common council of a city or town is its legislature, and it therefore possesses the power to authorize the execution and issue of the obligations of the municipality. Without an express authorization by the council, no executive or administrative officer can bind the corporation by the issue of negotiable securities in its name. The mayor cannot do it,[2] nor can the

that in the absence of any statutory provision there is no rule of law limiting the extent of the credit." Paxson, J., in Williamsport *v.* Commonwealth, 84 Pa. St. 487, 501. "The power to execute and issue bonds, contracts or other certificates of indebtedness belongs to all corporations, public as well as private, and is inseparable from their existence. It is for this that they hold a common seal. No one would doubt that for a legal and authorized debt a municipal corporation might give its bond under its general corporated powers. If a bond given by such an obligor be void, it is not because of the form of the instrument, nor because general corporate powers do not warrant giving bonds, but because the debt for which the bond has been given was created without authority, against law or without law." Strong, J., in Commonwealth ex rel. Rainboth *v.* Pittsburg, 5 Wright, 284.

[1] See *post*, chapter on Rights of *Bona Fide* Holders.

[2] Little Rock *v.* State Bank, 3 Eng. (Ark.) 227; Short *v.* New Orleans, 4 La. Ann. 281; Goldschmidt *v.* New Orleans, 5 La. Ann. 436.

trustees or selectmen of towns and villages,[1] nor the mayor and recorder of a city,[2] nor the auditor of a city.[3] Nor is there any such implied power in county judges or supervisors,[4] nor in the clerks of the county courts and boards of supervisors,[5] nor in the police jury of a parish.[6]

§ 136. **Whether unauthorized agents are personally liable.** — It is the common rule of the law of agency, that if one without authority represents himself to be the agent of another, or while he is acting as agent exceeds the limits of his authority, so that his acts do not bind the principal, the agent is himself responsible to the third person dealing with him. He is said to guarantee his authority to act for the principal.[7] But it is different with the agents and officers of governments and public corporations. Since their power to act for their principals is a matter of public law, every one having dealings with them is charged with the legal limitations of their agency. There is, therefore, not the same reason to require of the public agent a guaranty that he is acting with authority, for that fact can be easily ascertained by any one who examines the law.[8] "It may be laid down as a universal rule, that when a public officer, acting under an innocent mistake of the law, makes a

[1] Rich *v.* Errol, 51 N. H. 350; Lake *v.* Trustees, 4 Den. 520; Hubbard *v.* Town of Lyndon, 28 Wis. 674.

[2] Clark *v.* Des Moines, 19 Iowa 200.

[3] Dana *v.* San Francisco, 19 Cal. 486; People *v.* Gray, 23 Cal. 125; Keller *v.* Weeks, 22 Cal. 460.

[4] Hyde *v.* County of Franklin, 27 Vt. 186; Daviess Co. Court *v.* Howard, 13 Bush, 102; People *v.* Supervisors El Dorado Co., 11 Cal. 175; Chemung Canal Bank *v.* Supervisors, 5 Den. 517; Inhabitants *v.* Weir, 6 Ind. 224.

[5] Parcel *v.* Barnes, 23 Ark. 261; Clark *v.* Polk Co., 19 Iowa, 248.

[6] Police Jury *v.* Britton, 15 Wall. 566; Bearman *v.* Board of Police, 42 238.

[7] See *ante*, § 84.

[8] Jones, Indorsee *v.* Le Tombe, 3 Dall. 384; Hodgson *v.* Dexter, 1 Cranch, 345; Walker *v.* Christian, 21 Gratt. 297.

contract in the name of the State or of the municipal corporation, which he was not authorized to make, neither he nor the State or municipality is bound by the contract.[1] This rule applies with its full force to the unauthorized issue of commercial securities by public agents.

Another important distinction between public and private agents is, that the powers of the public agent are defined by statute, and cannot be extended or amplified by custom, so as to enable such an agent, like the private agent, to bind his principal by acts falling within the apparent scope of the agent's authority, and without the express limitations.[2]

§ 137. **Form of signature by public agents.** — But when it is stated that the public agent is not personally liable on negotiable instruments, executed by him in his official capacity, it must be understood that the fact of his acting in his official character must appear upon the face of the instrument, in order to free him from personal responsibility. If nothing appears on the face of the instrument to indicate the contrary, he is presumed to be acting in his personal character, and is therefore personally liable.[3] We have already seen what amount of technicality is observed in determining whether the agent of a private corporation intends to bind himself or the corporation.[4] And, although some of the cases, ignoring the distinction between public and private agents, apply the same technical rules

[1] Ogden *v.* Raymond, 22 Conn. 379; Ives *v.* Hulett, 12 Vt. 314; Stone Huggins, 28 Vt. 617; Dameron *v.* Irwin, 8 Ired. L. 421; Tucker *v.* Justices, 13 Ired. L. 434; Duncan *v.* Niles, 32 Ill. 532; Potts *v.* Henderson, 2 Ind. 327; Houston *v.* Clay Co., 18 Ind. 396; Tucker *v.* Shorter, 17 Ga. 620; Boardman *v.* Hayne, 29 Iowa, 339; Hall *v.* Cockrell, 28 Ala. 507; Copes *v.* Mathews, 10 Sm. & Marsh. 398.

[2] The Floyd Acceptances, 7 Wall. 666; Whitesides *v.* United States, 93 U. S. 257; Pierce *v.* United States, 1 N. H. 270; Mayer *v.* Eschback, 17 Md. 282; State of Missouri *v.* Bank of Missouri, 45 Mo. 528.

[3] Story on Agency, § 306; 1 Daniel's Negot Inst. § 445.

[4] See *ante*, §§ 123–127.

to the agents of public corporations;[1] a praiseworthy step is taken by the other cases, in cutting away from the common-law ruling, and holding that when an official executes a negotiable instrument, and adds his official designation to his signature, he undertakes thereby to execute a paper in the name of the public corporation, of which he is an officer, and does not act in his individual capacity.[2]

[1] In Cahokia School Trustees *v.* Rantenburg, 88 Ill. 219, the notes ran "I promise" and were signed "A. & B., trustees." In Bayliss *v.* Peterson, 15 Iowa, 279, the note was signed "Committeemen for the erection of a school house in District No. 1;" Fowler *v.* Atkinson, 6 Minn. 579, ("Trustees of School District No. 1"); Bingham *v.* Stewart, 13 Minn. 106 (We, the trustees of School District No. 100," signed "A. B., trustees.") In these cases, the corporations are school districts, the most limited form of public corporations.

[2] In Dugan *v.* United States, 3 Wheat. 172, a bill payable to "Thomas T. Tucker, Treasurer of the United States" was held to be payable to the United States, Marshall, Ch. J., saymg: "If it be generally true that when a bill is indorsed to the agent of another for the use of his principal, an action cannot be maintained in the name of such principal (on which point no opinion is given), the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears not only on the face of the instrument, but from all the evidence, that they alone were interested in the subject-matter of the controversy." See also Balcombe *v.* Northrup, 9 Minn. 173 (note payable to "I. E. F. U. S., Indian agent, his successors in office, or order, for the use of the Winnebago tribe, etc"); Irish *v.* Webster, 5 Greenl. 171 (to "James Irish, Land Agent of Maine"), United States *v.* Boyce, 2 McLean, 352; State *v.* Boies, 2 Fairf. 474; School Town of Monticello *v.* Kendall, 72 Ind. 208 (37 Am. Rep. 139, 142, notes); Baker *v.* Chambles, 4 Greene (Iowa), 428 ("We, the undersigned directors of School District No. 4 promise" signed simply with their names); Andrews *v.* Estes, 11 Me. 267 (We, the undersigned committee for the First School District," etc., signed "A. B. & C., Committee"); Hodges *v.* Runyan, 30 Mo. 491 ("The Presidentof the Board of School Trustees, promised in their behalf); McGee *v.* Laramore, 50 Mo. 425 ("I, A. B., Director of School Dictrict No. 2, promise," etc., signed "A. B., director"); Randall *v.* Van Vechter, 19 Johns. 60 (contracts under seal signed by "A. B. C., a committee appointed by the corporation of Albany for the purpose"); Fox *v.* Drake, 8 Cow. 191 (contract signed by A. & B. C." commi-sioners for building the court house at Oswego village").

§ 138. **Drafts or warrants of one officer on another, whether negotiable.** — It is a very common custom for officers of municipal and public corporations, who are entrusted with the power and duty of making contracts for the corporation which employs them, to complete the contracts by executing and issuing drafts or warrants on the disbursing officer. The principal object of these drafts or warrants is to furnish the disbursing officer with the necessary vouchers. They differ little in character from the common forms of attestation of the correctness of bills that may be presented to the corporation. That being the object of their issue, there is no reason why they should have the character of negotiability. And should the officer, authorized to issue the warrant, execute it in the form of a negotiable instrument, he exceeds his powers and in this respect does not bind the corporation.[1] But while the

[1] Where an auditor drew upon the treasurer, Baldwin, J., said: "We think that the plaintiff, counting alone upon the county scrip or warrants, as negotiable instruments, evidencing of themselves an indebtedness on the part of the county, cannot maintain his pretensions. * * * The reason is that the auditor had no authority to draw a bill of exchange, but he can only, in certain cases, issue warrants upon the order of the supervisors, or the allowance by the board, of an account which is chargeable as a debt upon the county. The warrant is not intended to constitute a new debt, or evidence of a new debt, against the county, but is the prescribed means the law has devised for drawing money from the county treasury. It may be very true, that the warrant as an open account may be assigned, and the assignee be protected as a holder of a claim against the county. But this would be, not because the indorsement of the warrant carried with it the legal title of the scrip to the assignee, as an indorsee under the law merchant, but because the transaction would be, in equity, the assignment of the debt on which the scrip issued, and an authority to the assignee to receive the money. The question here is, not whether the county had the power to make a bill of exchange, but whether the auditor, when under the statute he issues the warrant, has the power to give it the form and qualities of such an instrument. We think he has not, and that the paper, as here presented, has no such effect, if indeed it was so designed." See also to the same effect, Camp *v.* Knox Co., 3 Lea (Tenn.), 199; Smith *v.*

authorities in the main support the view just explained, yet a few cases hold, if the warrant be made negotiable in form, by an officer authorized to issue it, it will be a good negotiable instrument.[1]

Where the warrants are held to be vouchers only, they do not bear interest, even after demand and refusal of payment.[2] But where they are regarded as negotiable instruments, it is held that interest begins to run from the day payment was refused." [3]

Cheshire, 13 Gray, 318; Hyde *v.* County of Franklin, 27 Vt. 186; Chemung Canal Bank *v.* Supervisors, 5 Denio, 517; Wall *v.* County of Monroe, 103 U. S. 77; County of Ouachita *v.* Walcott, 103 U. S. 559; Clark *v.* Des Moines, 19 Iowa, 200; School Directors *v.* Fagleman, 76 Ill. 189; Steinbeck *v.* Treasurer, 22 Ohio St. 144; State *v.* Huff, 63 Mo. 288; Short *v.* New Orleans, 4 La. Ann. 281; Goldschmidt *v.* New Orleans, 5 La. Ann. 436; People *v.* Gray, 23 Cal. 125; Clark *v.* Polk Co., 19 Iowa, 248; Keller *v.* Hicks, 22 Cal. 460; Mayor *v.* Ray, 19 Wall. 478; Fox *v.* Shipman, 19 Mich. 218; Emory *v.* Mariaville, 56 Me. 315; Sturtevant *v.* Liberty, 46 Me. 457; Newell *v.* School Directors, 68 Ill. 514; East Union Township *v.* Ryan, 86 Pa. St. 459; School District *v.* Stough, 4 Neb. 357.

[1] In Kelly *v.* Mayor of Brooklyn, 4 Hill, 265, Cowen, J., said: "The draft was signed and countersigned according to the statute, by the mayor and clerk. There is nothing in the statute expressing or implying an inhibition to make the warrants negotiable. * * * Independently of any statute provision, a corporation may issue negotiable paper for a debt contracted in the course of its proper business. Moss *v.* Oakley, 2 Hill, 265. This is a power incident to all corporations, and no provision in its charter or elsewhere, merely directing a certain form in affirmative words, should be so construed as to take away the power. The draft in question was issued by the agents of the defendants, acting according to the usual course in such matters." See also Crawford County *v.* Wilson, 7 Ark. 219. In Sweet *v.* County Commissioners, 16 Minn. 107, it was held that the payment of such a warrant to the bearer was a good defense to the rightful owner. And in Talty *v.* Freedman's Trust Co., 1 MacArth. 522, it was held that notwithstanding such a warrant is not a negotiable instrument for other purposes, it is so far negotiable as that the payee cannot recover it of a *bona fide* holder, who obtained it from one, to whom it was pledged as collateral security, without paying to such holder the amount he paid for it.

[2] Allison *v.* Juniata County, 50 Pa. St. 353; Dyer *v.* Covington Township, 19 Pa. St. 200.

[3] Commissioners of Leavenworth *v.* Keller, 6 Kan. 518.

§ 139. **Indorsement or assignment of corporate drafts or warrants.** — Wherever the draft or warrant is held to be negotiable, it may be transferred by indorsement, like any other negotiable instrument, and the indorser is subject to the same liabilities as the indorser of a bill or note.[1] But when the character of negotiability is denied to these instruments, one who transfers one of them does not become liable as an indorser, except, perhaps, that he may be made to return the consideration he received, if this draft or warrant proves to be invalid or illegal.[2]

But, although as a general rule these warrants are held to be non-negotiable, it is universally conceded that they can, in the absence of express restrictions, be assigned, like any other contract, and the assignee may recover of the corporation in the appropriate action, whatever claim the assignee held against it. But whether the action can be brought in the name of the assignee or in that of the assignor, is differently decided by the different courts. As a matter of course, if the warrant is held to be negotiable, the indorsee can sue in his own name.[3] But since non-negotiable contracts were not assignable at common law, the law courts did not recognize the assignee, as having any individual standing in court, and if suit is brought in such a court it must be brought in the name of the assignor. And the courts of equity would compel the assignors to permit the use of their names in the maintenance of such suits. This is still the law in all the States, in which this common-law rule has not been changed by statute.[4] But in most of the

[1] Bull *v.* Sims, 23 N. Y. 571.

[2] Keller *v.* Hicks, 22 Cal. 460.

[3] Kelly *v.* Mayor, 4 Hill, 263; Dalrymple *v.* Town of Whittingham, 26 Vt. 345; Clark *v.* School Dist., 3 R. I. 199; Moss *v.* Dadley, 2 Hill, 255; Justice *v.* Orr, 12 Ga. 137; Commissioners of Leavenworth *v.* Keller, 6 Kan. 510; Commissioners *v.* Day, 19 Ind. 450; Crawford County *v.* Wilson, 7 Ark. 219. See Dively *v.* Cedar Falls, 21 Iowa, 565.

[4] Hyde *v.* County of Franklin, 27 Vt. 185; Allison *v.* Juniata County,

States, the common-law rule has now been abolished; and there the assignees of these corporate drafts or warrants can sue in their own names; but they cannot claim any privileges or exemptions, to which their assignors were not entitled.[1]

§ 140. **Presentment of warrants for payment.** — Inasmuch as the warrant is an order drawn by one corporation on itself, through different agents or officers, it cannot be treated as a regular bill of exchange; and in the case of private corporations it has been held to be unnecessary for such a warrant to be presented for payment, before the corporation can be sued on it.[2] The same conclusion has been reached by some of the cases in reference to the warrants of municipal and public corporations.[3] But a different ruling has been adopted by other cases, on the ground that it was necessary to have the warrant presented to the disbursing officer, in order that he can make the proper arrangement for its payment. This would seem to be a very strong reason for requiring a presentment, and the reason is not confined to municipal corporations. All corporations, finding the use of warrants convenient or necessary, have extensive operations in their charge; and

50 Pa. St. 353; Dyer *v.* Covington Township, 19 Pa. St. 200; Smith *v.* Cheshire, 13 Gray, 318; Klein *v.* Supervisors, 54 Miss. 254.

[1] Sturtevant *v.* Liberty, 46 Me. 459; Emery *v.* Mariaville, 56 Me. 316; Campbell *v.* Polk Co., 3 Iowa, 467; Clark *v.* Des Moines, 19 Iowa, 199; Clark *v.* Polk Co., 19 Iowa, 248 See Int. Bank *v.* Franklin County, 65 Mo. 105, in which it was held that if there be a statutory form of assignment, it must be observed.

[2] See *ante*, § 128.

[3] Steel *v.* Davis County, 2 G. Green (Iowa), 469. See Miller *v* Thompson. 3 Man. & G. 576; Fairchild *v.* Railroad Co., 15 N. Y. 337; Bull *v.* Sims, 23 N. Y. 570; Justices *v.* Orr, 12 Ga. 137; Harvey *v.* W. P. S. Co., 1 Doug. (Mich.)193; Clark *v.* Polk Co., 19 Iowa, 247; Dana *v.* San Francisco, 19 Cal. 486.

if the warrant is not required to be presented, its value in the facilitation of the corporate business is greatly impaired.[1]

§ 141. **Warrants payable out of particular fund.** — If a warrant is directed to be paid out of a particular fund, it creates a charge against that particular fund, and not against

[1] In Varner *v.* Nobleborough, 4 Greenl, 126, where the selectmen drew upon the town treasurer, Mellen, C. J., said: "The selectmen were the agents of the town, drawing the order on their account on the town's banker. The case may be justly compared to that of a draft by a man on his banker, or a note payable at his banker's, or by his agent. In which cases it seems settled that the draft or note must be presented at the place appointed But in addition to the authority of decided cases, so nearly resembling this in principle, a strong argument against the present action arises out of the general, — perhaps we may say, the universal — mode of conducting the affairs of a town in the settlement of accounts and payment of debts due from the corporation to individuals. Persons transacting business according to an established and well-known usage, are presumed to assent to such usage and contract in reference to it. Now it is universally understood that selectmen, who draw an order on behalf of the town in favor of any of their creditors, have not the funds of the town in their hands, but that they are in possession of the treasurer. When any creditor of the town receives an order on the treasurer for the amount due to him, he must be considered as understanding these facts and assenting to this mode of receiving payment, and as accepting the order under an implied engagement to conform to the established usage, and present the order to the treasurer for payment. Good faith requires him to do this, and the law considers him as promising so to do. If, on presenting the order, payment be refused, the town which drew the order on itself must be answerable instanter, for the reason before assigned. But no sound reason can be given why a town should be subjected to the perplexity and costs of an action, before the payee of an order will give himself the trouble to do his duty and request payment of the money due him according to the terms of it. We have no reason to believe but that the contents of the order would have been promptly paid on application at the treasury. Justice, as well as law, are against the plaintiffs according to the facts before us." See also Pease *v.* Cornish, 19 Me. 193; East Union *v.* Ryan, 86 Pa. St. 459; Dalrymple *v.* Whittingham, 26 Vt. 346; Central *v.* Willcoxen, 3 Col. 566; Kelly *v.* Mayor, 4 Hill, 265.

the corporation in general.[1] But a distinction is made by the authorities between making a warrant payable only out of a particular fund, and indicating the source from which the money is to come. In the latter case, it is held that the warrant creates a general charge against the corporation.[2]

§ 142. **Suit on original indebtedness.** — Because it is the custom of a municipal or public corporation to liquidate its indebtedness by the issue of warrants on its treasurer, is no reason why the creditor is compelled to accept payment in that form.[3] He may refuse to accept anything but legal tender. But if he does accept the warrant, his acceptance of it constitutes an implied consent to this mode of payment, and he could not afterward demand payment of the debt, without producing the warrant or offering satisfactory proof of its destruction or its loss.[4] And if in any case payment should be made, without a cancellation of the warrant, a *bona fide* holder could not recover on the warrant in any State where the warrant is denied to be a negotiable instrument.[5]

[1] Lake *v.* Trustees, 4 Den. 520 ("and charge the same to account of Union Avenue); Kingsberry *v.* Pettis County, 48 Mo. 207 (payable out of "the road and canal fund"). But if the particular fund, out of which the warrant was to be paid, fell short because of the peculation or misapplication of an officer, the holder of the warrant will have his appropriate claim against the general funds of the corporation, to the amount of the particular fund thus lost through the wrongful acts of the officer. State *v.* Pilsbury, 30 La. Ann. 705.

[2] Pease *v.* Cornish, 19 Me. 191 ("it being his proportionate part of the surplus revenue fund"); Kelley *v.* Mayor, 4 Hill, 263 ("For award No. 7, and charge to Bedford Road Assessment").

[3] Benson *v.* Carmel, 8 Greenl. 110; Willey *v.* Greenfield, 30 Me. 452.

[4] Commissioners of Floyd County *v.* Day, 19 Ind. 451; Sweet *v* Carver County, 16 Minn. 107; Crawford County *v.* Wilson, 7 Ark. 219.

[5] Channing Canal Bank *v.* Supervisors, 5 Den. 517.

But if the warrant has been issued without authority,[1] or it has been presented, and payment refused, then it is held that suit may be brought on the original indebtedness. And where the officer had neither an express nor an implied authority to issue the warrant, it cannot be made even the *prima facie* ground of recovery.[2]

[1] Allison *v.* Juniata County, 50 Pa. St. 353. See Dana *v.* San Francisco, 79 Cal. 491.

[2] Allison *v.* Juniata County, 50 Pa. St. 353.

CHAPTER IX.

TRUSTEES, GUARDIANS AND PERSONAL REPRESENTATIVES AS PARTIES.

SECTION 145. Trustees and guardians as parties.
146. Personal representatives as parties.
147. What consideration necessary to bind personal representatives.
148. The executor or administrator as payee and indorser.

§ 145. **Trustees and Guardians as parties.**—Trustees and guardians have not the power to bind the estates they have in charge by any note or bill which they may attempt to issue in their representative capacity. And they will be personally liable on any commercial paper which they may issue, even though they stipulate in the paper that they are acting as trustee or guardian.[1] But, although the trustee or guardian will be personally liable on a note or bill, even where it has been given on a consideration accruing to the estate, yet in such a case, as between himself and the estate, he could lay claim to reimbursement to the amount of the benefit derived therefrom by the estate.[2] So, also, if

[1] Foster *v.* Fuller, 6 Mass. 58; McGavock *v.* Whitfield, 45 Miss. 452; Shiff *v.* Shiff, 20 La. Ann. 269; Thatcher *v.* Dinsmore, 5 Mass. 299; Conner *v.* Clark, 12 Cal. 168; Hills *v.* Banister, 8 Cow. 31. But see Taylor *v.* Shelton, 30 Conn. 122. And in the suit on such paper, it will be no error to allege that it is the individual paper of the trustee or guardian. See Robertson *v.* Banks, 1 Smedes & M. 666.

[2] Poole *v.* Williams, 42 Ga. 539; Gibson *v.* Irby, 17 Tex. 173; McDaniel *v.* Mann, 25 Tex. 101. But in Louisiana, it may be shown by parol evidence that the paper was issued for the benefit of the estate; and when this fact is established by parol evidence or otherwise, the estate will be charged with its payment, instead of the trustee or guardian. Johnson's Succession, 4 La. Ann. 253; Leonard *v.* Hudson, 12 La. Ann. 840; Lapeyrs *v.* Weeks, 28 La. Ann. 664.

the guardian or trustee promises to pay the note or other commercial paper *out of the funds* of the estate, he will only be liable if there are such funds, and he fails to make the appropriation of them which he has promised. But such a limitation of the liability of the maker would destroy the negotiability of the paper.[1]

In the same manner it has been held that drafts, signed by commissioners as such, are binding upon them individually.[2] The same rule has been followed in the case of a note indorsed or signed by some one as "receiver."[3]

But when a note or bill is made payable to a trustee or guardian, as such, the authorities are at variance in respect to the character, in which he takes the paper. According to some of the authorities, the express description of the payee as trustee or guardian, makes it impossible for any one to acquire the rights of a *bona fide* holder, after a misappropriation of the paper by the fiduciary payee. Any transfer of the paper will be made subject to the trust.[4] And the authorities are all agreed that the trustee or guardian cannot pass a good title to paper, payable to him in his representative capacity, in liquidation of his own private debts. The indorsee in such a case would take the paper charged with the trust.[5]

On the other hand, if a note is made payable to a guardian as such, the debts of the ward constitute a good set-off in an action on the note.[6] But when the commercial paper, so misappropriated, passes into the hands of

[1] 1 Parsons' N. & B. 90; 1 Daniel's Negot. Inst., § 271.

[2] Eaton *v.* Bell, 5 B. & Ad. 34.

[3] Towne *v.* Rice, 122 Mass. 67. See *post*, on the subject of receiver's certificates.

[4] Third Nat. Bank *v.* Lange, 51 Md. 138; Sturtevant *v.* Jaques, 14 Allen, 523; Shaw *v.* Spencer, 100 Mass. 382. In the last case the paper was a certificate of stock.

[5] Coons *v.* Kendall, 27 La. Ann. 443; Baughn *v.* Shackleford, 48 Miss. 255.

[6] Nickerson *v.* Gilliam, 29 Mo. 456.

an innocent purchaser, who has no actual notice of the fraud, it is held by many cases in opposition to the cases cited above, that the *bona fide* holder takes the paper free from the trust, and he is not charged with constructive notice, because the original payee has been designated as trustee or guardian.[1] And to such an extent do the courts go in recognizing the proprietary interest of the guardian or trustee in the paper made payable to him as such, that they hold he can sue upon it in his own name, and in his own right, even though the term of his office has expired;[2] and that after his death suit can be brought on it by his executor.[3] But if a note is made payable to the ward, the guardian cannot surrender it for a worthless security.[4]

If a note or bill is made payable to the guardian individually, although the ward may show that the note was based upon a consideration moving from his estate, yet in case the maker of the note becomes insolvent, it has been held that the guardian cannot prove, in order to throw the loss on the estate, that the note was taken by him as guardian.[5]

It has also been held that where the payee was described as "the lawful attorney of A., widow of D., deceased," he could sue on it in his own name.[6]

§ 146. **Personal representatives as parties.** — The executor or administrator of a decedent has no power to bind the latter's estate by any note or bill which he may make in his representative capacity.[7] So, also, is it impossible

[1] Thorton *v.* Rankin, 19 Mo. 193; Fountain *v.* Anderson, 33 Ga. 372; Westmoreland *v.* Foster, 60 Ala. 448. See Field *v.* Schieffelin, 7 Johns. Ch. 150.

[2] Zachary *v.* Gregory, 32 Tex. 452; Bingham *v.* Calvert, 13 Ark. 399.

[3] Chitwood *v.* Cromwell, 12 Heisk. 658.

[4] Smith *v.* Dibrell, 31 Tex. 239.

[5] Knowlton *v.* Bradley, 17 H. H. 458.

[6] Austell *v.* Rice, 5 Ga. 472.

[7] Curtis *v.* National Bank, 39 Ohio St. 579; Lynch *v* Kirby, 65 Ga. 279;

for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate.[1] In all such cases, the executor or administrator is personally liable, even though the signature is stated in the most explicit manner to have been made in his representative character.[2]

But the giving of a note by the executor or administrator for a debt of the estate does not release the estate from liability on the original indebtedness,[3] unless the note has been accepted as absolute payment of the original debt.[4] And if the executor or administrator expressly limits his obligation to payment out of the assets of the estate, his liability does not extend beyond the obligation to appropriate the funds of the estate to the payment of this debt.[5]

Funderburk *v.* Goroam, 46 Ga. 296. The estate is not bound, even when the executor gives his note, in the renewal of the note of the testator, or in payment of goods purchased by him under a testamentary power. Cornthwaite *v.* First Nat. Bank, 57 Ind. 268; Erwin *v.* Carroll, 1 Yerg. 144; Christian *v.* Morris, 50 Ala. 585.

[1] Wisdom *v.* Becker, 52 Ill. 342.

[2] Tassey *v.* Church, 4 Watts & S. 346; Funderburk *v.* Gorham, 46 Ga. 296; McFarlin *v.* Stinson, 56 Ga. 396; Harrison *v.* McClelland, 57 Ga. 531; Winthrop *v.* Jarvis, 8 La. Ann. 434; Beatty *v.* Tete, 9 La. Ann. 129; Kirkman *v.* Benham, 28 Ala. 501; Christian *v.* Morris, 50 Ala. 585; Cornthwaite *v.* First Nat. Bank, 57 Ind. 268; Rittenhouse *v.* Ammerman, 64 Mo. 197; Erwin *v.* Carroll, 1 Yerg. 144; Gregory *v.* Leigh, 33 Tex. 813; Aspinwall *v.* Wake, 10 Bing. 55; McElderry *v.* Chapman, 2 Port. (Ala.) 33; Tryon *v.* Oxley, 3 Iowa, 289; Davis *v.* French, 20 Me. 21; Sims *v.* Stillwell, 3 How. (Miss.) 176; Walker *v.* Patterson, 36 Me. 273; McKinney *v.* Peters, Dallam, 545; Kessler *v.* Hall, 64 N. C. 60; Livingston *v* Gaussen, 21 La. Ann. 286; Wightman *v.* Townroe, 1 M. & S. 412.

[3] Douglas *v.* Fraser, 2 McCord Ch. 105; Dunne *v.* Deery, 40 Iowa, 251.

[4] Yerger *v.* Foote, 48 Miss. 62; Erwin *v.* Canol, 1 Yerg. 144; Cornthwaite *v.* First Nat. Bank, 57 Ind. 269; Carter *v.* Thomas, 3 Ind. 213; Wisdom *v.* Becker, 52 Ill. 346. Where the only consideration to the note of the administrator or executor is the possession of assets of the estate, it is held that action may always be brought against the estate, even on the note. Faxon *v.* Dyson, 1 Cranch C. C. 441; Dixon *v.* Ramsey, 1 Cranch C. C. 472.

[5] Child *v.* Monins, 2 Brod. & B. 460; Ridout *v.* Bristow, 1 Tyrw. 90; 1

But in this case, the instrument is not negotiable, for the reason that it is payable out of a particular fund.[1]

§ 147. **What consideration necessary to bind personal representatives.**— If there is no new consideration supporting the promise of the executor or administrator, like any other promise, it is void and not binding. And the note of an administrator was held to be void for the want of a consideration, which was declared to be "for value received by A. (the intestate) and his heirs."[2] The express declaration of an impossible consideration rebutted all presumptions of the existence of a sufficient consideration. But as a general rule the law will presume a sufficient consideration in all such cases, until the contrary is shown to be true; at least, it is always presumed that the executor or administrator has sufficient assets of the estate in his hands, when he made the note or bill.[3] But this presumption may be rebutted by proper testimony; and if the note or bill is not supported by any other consideration, the personal representative cannot be held liable on it. His liability is limited in such a case to the amount of assets in his possession.[4]

Cromp. & J. 231; King *v.* Thorn, 1 T. R. 489; Serle *v.* Waterworth, 4 M. & W. 9; *s. c.* 6 Dowl. 684; Liverpool Borough Bank *v.* Walker, 4 De G. & J. 24; Bank of Troy *v.* Topping, 9 Wend. 273; Snead *v.* Coleman, 7 Grat. 303; Carter *v.* Sanders, 2 How. (Miss.) 851; Kirkman *v.* Benham, 28 Ala. 501. Merely describing himself as "executor" or "administrator" is, however, not sufficient to impose this limit on his liability. Tryon *v.* Oxley, 3 G. Greene, (Iowa), 289.

[1] See *ante*, § 26, and cases cited in preceding note.

[2] Ten Eyck *v.* Vanderpoel, 8 Johns. 93.

[3] Bank of Troy *v.* Topping, 13 Wend. 557; Rittenhouse *v.* Ammerman, 64 Mo. 197.

[4] Davis *v.* French, 20 Me. 21; Walker *v.* Patterson, 36 Me. 273; Bank of Troy *v.* Topping, 13 Wend. 273; Rucker *v.* Wadlington, 5 J. J. Marsh. 238; Byrd *v.* Holloway, 6 Sm. & M. 199; Steele *v.* McDowell, 9 Sm. & M. 193; Rittenhouse *v.* Ammerman, 64 Mo. 197.

Some other consideration than the original indebtedness of the decedent is always necessary. But where the note of the decedent is surrendered and cancelled, and especially where the executor or administrator, in making his note as a substitute for the note of the deceased, has the time of payment extended, or receives some other indulgence, there is sufficient consideration present to make the obligation absolute, and independent of the possession of assets.[1] But if the note or other instrument of indebtedness is negotiable, the question of consideration can only be inquired into, as a defense, as long as the paper has not passed into the hands of an indorsee for value and without notice. As against such an indorsee, the presumption of consideration becomes conclusive.[2]

§ 148. **The executor or administrator as payee and indorser.** — Where a note or bill is made payable to an executor or administrator as such, he has his election to treat it as assets of the estate or as his own property. If he treats the paper as assets, he can sue on it in the character of an executor, and join in the same action counts upon the promises made to the executor in his life time.[3] And if the executor or administrator should die or resign from his office without bringing suit on such paper, the administrator *de bonis non* is the proper party to bring the action.[4]

But if the executor or administrator should elect to treat

[1] Thompson *v.* Maugh, 3 Iowa, 342; Mosely *v.* Taylor, 4 Dana, 543; Harrison *v.* McClelland, 57 Ga. 531. See Hester *v.* Wesson, 6 Ala. 415.

[2] Bank of Troy *v.* Topping, 13 Wend. 273; Rucker *v.* Wadlington, 5 J. J. Marsh. 238; Byrd *v.* Holloway, 6 Sm. & M. 199; Steele *v.* McDowell, 9 Sm. & M. 193. See *post*, § 154.

[3] Bogert *v.* Hertell, 4 Hill, 503; King *v.* Thorn, 1 T. R. 487; Sheets *v.* Pabody, 6 Blackf. 120; Fry *v.* Evans, 8 Wend. 530. See Baker *v.* Baker, 4 Bibb, 346; Hemphill *v.* Hamilton, 11 Ark. 425.

[4] Catherwood *v.* Chapand, 1 B. & C. 150 (2 Dowl. & R. 271); Sheets *v.* Pabody, 6 Blackf. 120; Court *v.* Partridge, 7 Price, 591; Leach *v.* Lewis, 38 Ind. 155.

such paper as his own property, he can sue on it in his own name.[1] And in the event of the death of the executor or administrator the right of action would pass to his personal representative and not to the administrator *de bonis non* of the estate.[2] But, of course in every such case, the executor or administrator is himself accountable to the estate, and must charge himself with the amount of the paper, before he can become the absolute owner of it.[3]

Where the bill or note is made payable to the decedent during his life time, it comes into the possession of the representative, like every other species of personal property. He is required and authorized to do with it, whatever the deceased could or should have done;[4] but, as a matter of course, he could bring suit on these instruments only in his representative capacity.

Whether the note or bill is made payable to the decedent or to the personal representative as such, in either case the personal representative has the right to transfer it. If the instrument is non-negotiable, the act of transfer is an assignment; and if the instrument is negotiable, it can only be transferred by indorsement.[5] And unless the personal

[1] Cravens *v.* Logan, 7 Ark. 105; Thomas *v.* Relfe, 9 Mo. 373; Gilman *v.* Horsley, 5 Mart. (N. S.) 661; Clampit *v.* Newport, 8 La. Ann. 124; Carter *v*, Saunders, 2 How. (Miss.) 851.

[2] Hemphill *v.* Hamilton, 11 Ark. 425; Cravens *v.* Logan, 7 Ark. 103.

[3] Dunlap *v.* Newman, 47 Ala. 429; Buie *v.* Pollock, 54 Miss. 9.

[4] King *v.* Thorn, 1 T. R. 487. And this is also true of a bill or note, which is made payable to the deceased, and executed after his death, but in ignorance of it. Murrey *v.* East India Co., 5 B. & Ald. (7 E. C. L. R.) 204; Morse *v.* Clayton, 13 Sm. & M. 373. And Mr. Parsons thinks this would also be the case, if it were done with knowledge of the death of the payee, since this could not be done with any other intention than to place it in the hands of the personal representative. 1 Parsons' N. & B. 154. But see Valentine *v.* Holloman, 63 N. C. 475.

[5] Rowlinson *v.* Stone, 3 Wils. 1; Cahoun *v.* Moore, 11 Vt. 604; Grace *v.* Hannah, 6 Jones L. 94; Cryst *v.* Cryst, 1 Smith (Ind.), 370; Morse *v.* Clayton, 13 Sm. & M. 373; Taylor *v.* Surget, 14 Hun, 116; Owen *v.*

representative exempts himself by an express limitation he becomes personally liable as an indorser, if payment should be refused.[1] But an executor or administrator cannot in any case transfer notes and bills payable to himself as such or to the decedent, in payment of a debt of his own, or in payment of property purchased by him. And where he has attempted to do this, the notes and bills thus illegally disposed of can be recovered of any indorsee who takes them with notice of the fraud.[2] It is not necessary that the indorsee should have actual notice, in order to destroy his good faith. He is charged with notice of the trust by the fact that the instruments are made payable to the personal representative as such.[3]

It is the general rule that if a note or bill is made payable to a decedent, any one of his representatives may indorse it without the others joining in the act.[4] But it has been held that if a note or bill is payable to the personal representatives, all must join in the indorsement.[5]

An indorsement is of no value, unless there has been a delivery of the paper. It is altogether nugatory without delivery. Where, therefore, a payee indorses the paper and dies without delivery, his personal representative cannot pass title, merely by delivering the paper. He

Moody, 29 Miss. 79; Makepeace *v.* Moore, 10 Ill. 474; Hanrick *v.* Craven, 39 Ind. 241; Clark *v.* Moses, 50 Ala. 326.

[1] Foster *v.* Fuller, 6 Mass. 58.

[2] Scott *v.* Searles, 7 Sm. & M. 498; Booyer *v.* Hodges, 45 Miss. 78; Barwick *v.* White, 2 Del. Ch. 284; Miller *v.* Williamson, 5 Md. 219; Miller *v.* Helm, 2 Sm. & M. 687; Makepeace *v.* Moore, 10 Ill. 474.

[3] Payne *v.* Flournoy, 29 Ark. 500; Miller *v.* Williamson, 5 Md. 219; Booyer *v.* Hodges, 45 Miss. 78; Miller *v.* Helm, 2 Sm. & M. 687.

[4] Hertell *v.* Bogert, 9 Paige, 52; Wheeler *v.* Wheeler, 9 Cow. 34; Mosley *v.* Graydon, 4 Strob. 7; Sanders *v.* Blaine, 6 J. J. Marsh. 446; Dwight *v.* Newell, 15 Ill. 333.

[5] Smith *v.* Whiting, 9 Mass. 334. See Johnson *v.* Mangum, 65 N. C. 146. But see *contra*, Bogert *v.* Hertell, 4 Hill, 492; 1 Parsons' N. & B. 155, 159.

must also indorse it himself.[1] On the other hand, if the decedent has delivered the note or bill with an agreement to subsequently indorse it, and he either failed or refused to indorse according to the agreement, his personal representative may in an action for specific performance be compelled to make the indorsement, since the delivery was sufficient without indorsement to pass the equitable title.[2]

[1] Clark *v.* Sigourney, 17 Conn. 511; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Clark *v.* Boyd, 2 Ohio, 56; Taylor *v.* Surget, 21 N. Y. S. C. (14 Hun) 116; Bromage *v.* Lloyd, 1 Exch. 32.

[2] Malbon *v.* Southard, 36 Me. 147; Smith *v.* Pickery, Peake, 50; Watkins *v.* Maule, 2 J. & W. 237.

CHAPTER X.

THE CONSIDERATION.

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§ 151. **The necessity of consideration.** — It is the unfailing rule of the English and American law that no executory contract can be enforced in the courts, unless it be supported by a valuable consideration.[1] Hence, in order that a negotiable instrument may in England, and in this country, be enforced between the original parties, it must

[1] Tenny *v.* Prince, 4 Pick. 385; *s. c.* 7 Pick. 243; Lang *v.* Johnson, 4 Foster (N. H.), 302; Washington Bank *v.* Farmer's Bank, 4 Johns. Ch. 62; Aldridge *v.* Turner, 1 Gill & J. 427; Littlejohn *v.* Patillo, 2 Hawks, 302; Doebler *v.* Waters, 30 Ga. 344; Lowe *v.* Bryant, 32 Ga. 235; Gay *v.* Botts, 13 Bush, 299; Travis *v.* Duffan, 20 Tex. 49; Bailey *v.* Walker, 29 Mo. 407; Eagle Mfg. Co. *v.* Jennings, 29 Kan. 657; Culver *v.* Banning, 19 Minn. 303; Reynolds *v.* Burlington, etc., R. R. Co., 11 Neb. 186; Hendy *v.* Kier, 59 Cal. 138; Currie *v.* Misa, L. R. 10 Ex. 153; Thomas *v.* Thomas, 2 Q. B. 851; Edgeware Highway Board *v.* Harrow Dist. Gas Co., L. R. 10 Q. B. 92.

be founded upon a valuable consideration. Although the doctrine of consideration is not known to the systems of jurisprudence of continental Europe, and to other systems derived from the Roman law, in the general character which it has in our own system, yet the main principle of the doctrine is recognized, at least in regard to commercial paper, so that it may be safely said that the law of the entire civilized world requires all commercial instruments of indebtedness to be based upon a valuable consideration.[1] Accommodation paper, as long as it remains in the hands of the original parties, cannot be enforced anywhere.

§ 152. **What instruments import a consideration.** — According to the English and American common law, every species of commercial paper imports a consideration, so that a consideration need not be expressly proved, in order to sustain an action on such paper. Although it was once held to be necessary to have in the body of the instrument an express acknowledgment of consideration, in order to raise the presumption of consideration,[2] it is now generally held, in England[3] and in the United States to be unnecessary.[4] Not only is this the case, where the instrument has all the characteristics of a negotiable instrument, but a paper has also been held to import a consideration, although it may lack one of these characteristics; for example, when

[1] See § 152.

[2] Cramlington *v.* Evans, 1 Show. 5.

[3] Popplewell *v.* Wilson, 1 Stra. 264; Claxton *v.* Swift, 2 Show. 496; Grant *v.* DaCosta, 3 M. & S. 351; Macload *v.* Snee, Ld. Raym. 1481.

[4] Mandeville *v.* Welch, 5 Wheat. 277; Keadall *v.* Galvin, 15 Me. 131; Townshend *v.* Derby, 3 Metc. 363; Dean *v.* Carruth, 108 Mass. 242; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. 217; Hughes *v.* Wheeler, 8 Cow. 83; Underhill *v.* Phillips, 10 Hun, 591; Kinsman *v.* Birdsell, 2 E. D. Smith, 395; Hook *v.* Pratt, 78 N. Y. 371; Peasley *v.* Boatwright, 2 Leigh, 195; Hubble *v.* Fogartie, 3 Rich. 413; Hanley *v.* Lang, 5 Port. 154; Murry *v.* Clayborn, 2 Bibb, 306; Matlock *v.* Livingston, 9 Sm. & M. 489; People *v.* McDermott, 8 Cal. 288.

the words "or order," "or bearer" have been omitted from an otherwise good negotiable instrument.[1] But this would be different, if the omission was so serious as to take away from the paper the character of negotiability altogether, as, for example, where it was directed to be paid conditionally or out of a particular fund. In such a case, the consideration would have to be averred and proved, at least, if the paper did not contain the words "value received," or some other express acknowledgment of consideration.[2] But where the instrument is non-negotiable, and not under seal, there is no presumption of consideration, unless the instrument contains the words "value received" or some other express acknowledgment of the consideration.[3]

By statute, in some of the States, notably Arkansas,[4] Missouri,[5] and Pennsylvania,[6] it is required that all promissory notes must contain the words "for value received," in order to make them negotiable.

The note or bill does not necessarily presume a consideration existing prior to its execution, but it does import a consideration that is at least contemporaneous.[7]

[1] Haydock *v.* Lynch, 2 Ld. Raym 1563; Josceline *v.* Lassere, 10 Mod. 294; Averett's Adm. *v.* Booker, 15 Gratt. 169.

[2] Atkinson *v.* Manks, 1 Cow. 691; De Forest *v.* Frary, 6 Cow. 151; Josceline *v.* Lassere, 10 Mod. 294, 317; Haydock *v.* Lynch, 2 Ld. Raym. 1563; Averett's Admr *v.* Booker, 15 Gratt. 169; Belderback *v.* Burlingame, 27 Ill. 338; Frank *v.* Irgens, 27 Minn. 43.

[3] Boune *v.* Ward, 51 Me. 191; Walrad *v.* Petrie, 4 Wend. 575; 1 Parsons' N. & B. 226; Courtney *v.* Doyle, 10 Allen, 123; Peasley *v.* Boatwright, 2 Leigh, 198; Averett's Admr. *v.* Booker, 15 Gratt. 165.

[4] In Arkansas the words "value received" are not necessary to the negotiability of the instrument, but are required in order to recover certain statutory damages. Rev. Stat. Ark. (1874), §§ 568, 556.

[5] Rev. Stat. 1879, § 545, Rev. Stat. (1835), 298, § 7; Beaty *v* Anderson, 5 Mo. 447; Macy *v.* Kendall, 33 Mo. 164; Bailey *v.* Smock, 61 Mo. 213; Stix *v.* Matthews, 63 Mo. 371.

[6] The act of 1797, — see Purdy Dig. (1872), p. 1173, § 1, — applies only to negotiable notes "bearing date in the city or county of Philadelphia."

[7] Johnson *v.* Lane's Trustees, 11 Gratt. 553.

§ 153. **What liabilities presumed to be included in the consideration.** — If there is no proof to the contrary, the execution of a note is held to support the presumption that it constitutes a settlement of all demands between the parties, after a complete accounting, the amount of the note being the balance found to be due by the maker to the payee. But this is at best a very weak presumption, and is rebutted by the slightest evidence, indicating a more limited consideration.[1]

§ 154. **Between whom question of consideration may be raised.** — It is a general rule that the defenses not apparent on the face of commercial instruments can only be set up against original parties and those subsequent indorsees who are not holders for value and without notice.[2] Applying this rule to the matter of consideration, it may be stated that the question of consideration can be raised as defense only between the original parties to the transaction, and those subsequent holders of the instrument who take it with notice or without value. As between such parties, any defense, showing that the consideration was insufficient, will be admissible to defeat the action; for example, that the consideration was illegal,[3] or fraudulent; or that it was given under a mistake.[5]

[1] Lake *v.* Lyson, 6 N. Y. 461; Sherman *v.* McIntyre, 14 N. Y. S. C. (7 Hun) 592; De Freest *v.* Bloomingdale, 5 Denio, 304; Dutcher *v.* Porter, 63 Barb. 20; Graves *v.* Shulman, 59 Ala. 406. And consideration is never presumed to include notes or other instruments of indebtedness, only open and unsettled accounts. Tisdale *v.* Maxwell, 58 Ala. 40.

[2] For a general discussion of the application of this rule, see chapter XIV., the Rights of Indorsees of Bills and Notes, and Chapter XVII., the Defenses to Actions on Bills and Notes.

[3] Edmond *v.* Groves, 2 M. & W. 642; Bingham *v.* Stanley, 2 Q. B. 117; Holden *v.* Cosgrove, 12 Gray, 216; Shirley *v.* Howard, 53 Ill. 455.

[4] Morton *v.* Rogers, 12 Wend. 484.

[5] Forman *v.* Wright, 11 C. B. 481; Southall *v.* Riggs 11 C. B. 481; Thomas *v.* Thomas, 7 Wis. 476.

As a general proposition, it may be stated that the want of a sufficient consideration may be pleaded as a defense in an action between the maker and payee of a note;[1] the drawer and payee of a bill;[2] the drawer and acceptor,[3] and the indorser and the immediate indorsee of a bill or note.[4] On the other hand, such defenses will not prevail in actions between indorsees and the maker or drawer,[5] between the payee and acceptor of a bill,[6] and between the indorsee and a remote indorser,[7] unless it can be further shown in evidence that the indorsee or payee is not a holder for value and without notice.

In such cases, it must not only be proved that the paper did not rest originally upon a sufficient consideration, but also that the plaintiff is not a *bona fide* holder for value.[8]

[1] Puget de Bras *v.* Forbes, 1 Esp. 117; Jeffries *v.* Austin, 2 Stra. 674.

[2] Spurgin *v.* McPheeters, 42 Ind. 527; McCulloch *v.* Hoffman, 17 N. Y. S. C. (10 Hun), 133.

[3] Thomas *v.* Thomas, 7 Wis. 476; Spurgin *v.* McPheeters, 42 Ind. 527.

[4] Holiday *v.* Atkinson, 5 B. & C. 501; Abbott *v.* Hendricks, 1 Man. & G. 791; Easton *v.* Pratchett, 1 Cromp. M. & G. 798; 2 Cromp. M. & G. 542; Barnett *v.* Offerman, 7 Watts, 130; Clement *v.* Reppard, 15 Pa. St. 111; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392; Spurgin *v.* McPheeters, 42 Ind. 527; Klein *v.* Keyes, 17 Mo. 326.

[5] Price *v.* Keen, 40 N. J. L. 332; Etheridge *v.* Gallagher, 55 Miss. 464; Mechanics, etc., Bank *v.* Crow, 60 N. Y. 85; Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 757; Davis *v.* Bartlett, 12 Ohio St. 537; Duerson's Admr. *v.* Alsop, 27 Gratt. 248; Sloan *v.* Union Banking Co., 67 Pa. St. 479; Goodman *v.* Simonds, 20 How. 343; Bank of Pittsburg, 22 How. 96; Murray *v.* Lardner, 2 Wall. 110; Kellogg *v.* Curtis, 69 Me. 212; Smith *v.* Braine, 16 Q. B. 244; Cummings *v.* Thomson, 18 Minn. 252; Organ Co. *v.* Boyle, 10 Neb. 409.

[6] Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Laflin & R. Powder Co. *v.* Sinsheimer, 48 Md. 411; Marsh *v.* Low, 55 Ind. 271.

[7] Ethridge *v.* Gallagher, 55 Miss. 464.

[8] Thiedemann *v.* Goldsmith, 1 DeGex, F. & J. 4; Hunter *v.* Wilson, 19 L. J. Exch. 8; 4 Exch. 489; United States *v.* Bank of Metropolis, 15 Pet. 393; Swift *v.* Tyson, 16 Pet. 1; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Craig *v.* Sibbett, 15 Penn. 240; Boyd *v.* McCann, 10 Md. 118; Howell *v.* Crane, 12 La. Ann. 126; Watson *v.* Flanagan, 14 Tex. 354;

And it is the general rule in England and in the United States that the want of original consideration, when proven, does not throw upon the plaintiff the burden of showing that he is a *bona fide* holder for value,[1] unless the paper is payable to bearer; and in this case it has been held that the absence from the face of the paper of evidence of the fact, that the plaintiff is a transferee and not the original payee, throws upon him the burden of proving that fact.[2]

Where the instrument is supported by a consideration, it is no defense to an action by the indorsee against the maker, the drawer, the acceptor or any prior indorser, except the immediate indorser, that the plaintiff is not a holder for value. The want of consideration for the transfer by indorsement is a good defense only in an action by the indorsee against his immediate indorser.[3]

Spurgin *v.* McPheeters, 42 Ind. 527; Robinson *v.* Reynolds, 2 Q. B. (42 E. C. L. R.) 196.

[1] Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 757; Goodman *v.* Simonds, 20 How. 343; Bank of Pittsburg *v.* Neal, 22 How. 96; Murray *v.* Lardner, 2 Wall. 110; Whittaker *v.* Edmonds, 1 Mood. & R. 366; Mills *v.* Barber, 1 Mees. & W. 425; Smith *v.* Braine, 16 Q. B. 244; Fletcher *v.* Cashee, 32 Me. 587; Baxter *v.* Ellis, 57 Me. 180; Kellogg *v.* Curtis, 69 Me. 212; Duerson's Admr. *v.* Alsop, 27 Grat. 248; Harger *v.* Worrall, 69 N. Y. 370; Mechanics, etc., Bank *v.* Crow, 60 N. Y. 85; Wilson *v.* Lazier, 11 Gratt. 478; Davis *v.* Bartlett, 12 Ohio St. 537; Ellicott *v.* Martin, 6 Md. 509; Knight *v.* Pugh, 4 Watts & S. 445; Sloan *v.* Union Banking Co., 67 Pa. St. 479; Grenaux *v.* Wheeler, 6 Tex. 515; Cummings *v.* Thompson, 18 Minn. 252; Mathews *v.* Poythreas, 4 Ga. 287; Magee *v.* Badger, 34 N. Y. 247; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65; Holeman *v.* Hobson, 8 Humph. 127; Cropsey *v.* Averill, 8 Neb. 157; Organ Co. *v.* Boyle, 10 Neb. 409. See *contra*, Mayor of Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

[2] Bissell *v.* Morgan, 11 Cush. 198; 1 Daniel's Negot Inst., § 814a.

[3] Middlebury *v.* Case, 6 Vt. 165; Shane *v.* Lowry, 48 Ind. 205; Frederick *v.* Winans, 51 Wis. 472; McWilliams *v.* Bridges, 7 Neb. 419; Kelly *v.* Pember, 35 Vt. 183; Rickle *v.* Dow, 39 Mich. 91; Byers *v.* Harris, 9 Heisk. 652.

§ 155. **Real and apparent relation of parties.** — The real relation of the parties does not always appear on the face of the paper; and wherever the apparent relation of the parties differs from the real, it is always competent for the purpose of admitting or excluding the defense of consideration, to show by parol evidence what the true relation of the parties is. Thus, the name of the payee and indorsee is often left blank, and the blank filled up afterwards with the name of a subsequent holder, thus making him appear as the payee or prior indorsee.

In all such cases it is competent for him to show that he is not the original payee or immediate indorsee, and thus exclude the defense of want of consideration from his action on the instrument.[1]

In the issue of a bill of exchange for the purpose of remitting money to a distant place, there are very frequently four persons who have to do with its execution and issue, although the bill does not show on its face more than three. The three appearing on its face are the drawer, the payee and the acceptor. The possible fourth party is the remitter, he who procures the draft of the bill, and has it made payable to the payee, in satisfaction of some debt or other liability, or as a gift. That is, if A. wants to transfer a sum of money to B., living at a distant place, he goes to a banker of his town, C., and procures from him a bill of exchange, drawn by him on D., a banker, living at B.'s domicile, or at some mercantile center, and made payable to B. In such a case, the original consideration for the bill moved from A., and if it failed for any reason, the question could be raised in any action between A. and

[1] Hoffman *v.* Bank of Milwaukee, 12 Wall. 193; Arbouin *v.* Anderson, 1 Q. B. 498; Munroe *v.* Bordier, 8 C. B. 862; Horn *v.* Fuller, 6 N. H. 511; Brummel *v.* Enders, 18 Gratt. 905; Frank *v.* Lidienfeld, 33 Gratt. 378; Pindar *v.* Barlow, 31 Vt. 539; Nelson *v.* Cowing, 6 Hill, 336; Rich *v.* Starbuck, 51 Ind. 87; Glasscock *v.* Rand, 14 Mo. 550.

C.; but since B., the payee, was not a party to the original transaction, C. could not set up the want of consideration as against the payee, B., unless B. is shown to have taken the bill without paying value for it. Where B. has paid value, he is a subsequent holder, who takes the paper free from the defense of want of consideration. But if B. is a donee, instead of a *bona fide* holder, he cannot enforce the bill against the drawer, C.[1] But this is only true when the remitter is not the agent of the payee. If the remitter is the agent of the payee, and procures the bill in the capacity of an agent, the payee is an original party, and want of consideration may be pleaded against the payee.[2]

A similar state of facts may arise in the issue of a promissory note. For example, if A. procures C. to make a note payable to B., in satisfaction of a claim B. has against A., it would be no defense to an action by B. that no consideration moves from A. to C. But if there is no consideration between A. and B., then B. is not a *bona fide* holder for value, and cannot therefore plead immunity from the defense of want of consideration between A. and C.[3] But where the consideration moving from A. to C. is illegal, not only must there be a consideration moving from A. to B., but B. must also be ignorant of the fact that the original consideration was illegal.[4]

[1] Munroe *v.* Bordier, 8 C. B. (65 E. C. L. R.) 862.

[2] In Puget *v.* De Bras, 1 Esp. 117, the plaintiff, living in Holland, directed his agents in London to collect money owing to him, and remit to him. The agents, in accordance with the custom of London, bought of the defendant bills on Holland in favor of the plaintiff on the 17th of February, with the understanding that they were to be paid for on the next post-day, which was February 21. The bills were forwarded on the latter day to the plaintiff, but on the 20th the London agents failed. The court held that the plaintiff could not recover.

[3] South Boston Iron Co. *v.* Brown, 63 Me. 139; Aldrich *v.* Stockwell, 9 Allen, 45; Railroad *v.* Chamberlain, 44 N. H. 497; Yeatman *v.* Mattison, 59 Ala. 382; Lea *v.* Cassen, 61 Ala. 312.

[4] Baker *v.* Collins, 9 Allen, 253. In this case the original considera-

It may also be shown that the drawer, instead of the acceptor, is the primary debtor. The presumption always is that the acceptor is the primary debtor; and as against a subsequent holder for value, the presumption is conclusive. Only when an action is instituted on the bill between the drawer and acceptor, is it possible to show that the drawer is the debtor and the acceptor is the creditor, as when the drawee accepts for the accommodation of the drawer.[1]

If the original consideration is illegal or fraudulent, the original payee cannot procure the superior title of an indorsee for value by indorsing the paper to one, who in turn indorses back to him. The want of consideration may be pleaded in defense of an action by him, even though the indorsements from and to him were made in good faith.[2]

§ 156. **To whom consideration must be given.** — Although the consideration, at least when it assumed the form of an affirmative benefit generally, moves to the promisor, yet that is not necessary. It will be a sufficient consideration for a promise, if some benefit is bestowed upon a third person in reliance upon the promise. For example, A. may give his note to B. in consideration of C. being furnished with articles of value, or being released from a debt which he owes to B.[3] On the same grounds, it has been held that a public officer may enforce a note given to

tion was a debt contracted by the sale of intoxicating liquors in violation of the law.

[1] Turner *v.* Browden, 5 Bush, 216; Pillano *v.* Van Mierop, 3 Burr, 1663. See Stark *v.* Alford, 29 Texas, 260; Trego *v.* Lowery, 8 Neb. 238.

[2] Sawyer *v.* Wisewell, 9 Allen, 42; Kost *v.* Bender, 25 Mich. 516; Tod *v.* Wick, 36 Ohio St. 387. See *post*, chapter on Rights of *Bona Fide* Holders.

[3] Rutland *v.* Brister, 53 Miss. 683; Hapgood *v.* Polley, 35 Vt. 649; Kracht *v.* Obst, 14 Bush, 34; Good *v.* Martin, 95 U. S. 90; Gay *v.* Mott, 43 Ga. 252; Crawford *v.* Shaw, 18 Ind. 495; Hoxie *v.* Hodges, 1 Ore. 251; Kinsman *v.* Birdsall, 2 E. D. Smith, 395.

him in consideration of some debt due to the State, county or city.[1] But in such cases, it is held that the consideration must be known to the promisor, in order to support the promise.[2]

§ 157. **When one consideration answers for more than one party.** — Not only may the promise of one be supported by a consideration moving to another, as in the case of a guarantor, but the same consideration will support the promises of all who are induced thereby to assume obligations. Co-makers of negotiable instruments, whether as joint principals or as principal and surety, are almost invariably bound by one consideration; and it has been held that a joint note implies a joint consideration.[3] This is likewise the case with one who indorses for another's accommodation, if made when or before the loan was negotiated; the indorsement constitutes a part of the original agreement, and needs no independent consideration.[4]

In every case, where parties join in the assumption of the same liability as co-makers of a note, or of different liabilities arising out of the same transaction, as maker and indorsers, the promises of all must be made before the

[1] Livingstone *v.* Hastie, 2 Caines, 246; Joy *v.* Phillips, 29 Me. 255; Kingsbury *v.* Ellis, 4 Cush. 578; County of Appling *v.* McWilliams, 69 Ga. 840. But see, *contra*, Kendrick *v.* Crowell, 38 Me. 42; Hunter *v.* Field, 20 Ohio 340; Crowell *v.* Osborne. 14 Vroom, 335.

[2] Ellis *v.* Clark, 110 Mass. 392; Pratt *v.* Hedden, 121 Mass. 116. But see Harrington *v.* Brown, 77 N. Y. 72, in which a surety signed a note two years after its execution and delivery; and the consideration proved was the promise of the maker at the time that the note was delivered that this third person should sign it as surety. It was held that the surety was bound, although he did not know of the maker's promise.

[3] Kinsman *v.* Birdsall, 2 E. D. Smith, 395. See Hapgood *v.* Polley, 35 Vt. 649; Hoxie *v.* Hodges, 1 Ore. 251.

[4] Austin *v.* Boyd, 24 Pick. 64; Leonard *v.* Vredenburgh, 8 Johns. 29; Bailey *v.* Freeman, 11 Johns. 220; Rogers *v.* Kneeland, 10 Wend. 218; *s. c.* 13 Wend. 114; DeWolf *v.* Raband, 1 Pet. 476; Simons *v.* Steele, 36 N. H. 73; Leonard *v.* Sweetzer, 16 Ohio, 1.

consideration is executed, in order that one consideration may support all the promises. An executed consideration cannot support a subsequent promise. For example, if, after the debt is contracted and the note delivered, the maker should procure the signature of another on the note, whether as co-maker, surety or indorser, this later signature does not create any liability in respect to the parties in immediate privity with the obligor, unless it is supported by a fresh consideration.[1] But indorsements for accommodation, as well as joint executions of negotiable instruments are presumed to have been made contemporaneous with the execution of the note.[2]

Where the subsequent indorsement or signing of the paper is made in performance of a previous promise made to the payee as an additional inducement for the loan or other consideration of the note, it is held that this prior promise is a sufficient consideration to support the liability created by the subsequent indorsement or signature.[3] This previous promise may be made by the maker of a note,[4]

[1] Clopton *v.* Hall, 51 Miss, 482; Brenner *v.* Gundersheimer, 14 Iowa, 82; Mecorney *v.* Stanley, 8 Cush. 85; Union Bank *v.* Willis, 8 Met. 504; Good *v.* Martin, 95 U. S. 90; Crossman *v.* May, 68 Ind. 242; Green *v.* Jones, 7 Jones, 581; Stone *v.* White, 8 Gray, 589; Green *v.* Thornton, 4 Jones, 230; Bebee *v.* Moore, 3 McLean, 387; Tenney *v.* Price, 4 Pick. 385; Joslyn *v.* [Collinson, 26 Ill. 61; Pfeiffer *v.* Kingsland, 25 Mo. 66; Green *v.* Shepherd, 5 Allen, 589; Williams *v.* Williams, 67 Mo. 661; Briggs *v.* Downing, 48 Iowa, 550; Clark *v.* Small, 6 Yerg, 418; Ware *v.* Adams, 24 Me. 177; Sawyer *v.* Fernald, 59 Me. 500; Harwood *v.* Johnson, 20 Ill. 367.

[2] Benthall *v.* Judkins, 14 Met. 265.

[3] Moies *v.* Bird, 11 Mass. 436; McNaught *v.* McClaughry, 42 N. Y. 22; Williams *v.* Perkins, 21 Ark. 18; Harrington *v.* Brown, 77 N. Y. 72. But see Howard *v.* Jones, 10 Mo. App. 81.

[4] Harrington *v.* Brown, 77 N. Y. 72; Moies *v.* Bird, 11 Mass. 436. But see Howard *v.* Jones, 10 Mo. App. 81. In Harrington *v.* Brown, *supra*, it was held that the surety need not know of this previous promise of the maker. But see, *contra*, Pratt *v.* Hedden, 121 Mass. 116; Ellis *v.* Clark, 110 Mass. 392.

or by the surety; and in that case it is not necessary for the maker to have known of this promise of the surety.[1]

The admission of the indorser, who signs after the delivery of the instrument, that he had received collateral security for indorsing, will not be sufficient to sustain his liability.[2]

§ 158. **Accommodation paper.** — When one lends his mercantile credit to another by signing his name to an instrument in the character of maker, drawer, acceptor or indorser, the instrument, so far as such signature is concerned, is called *accommodation paper*. The obligation, arising out of this signature, is assumed for the accommodation of the other person, and is not supported by any consideration moving to the person so signing. Therefore, as between the accommodating and the accommodated proof of the want of consideration would defeat the action. The accommodation paper is a mere blank, has no value, until it has been negotiated, when it becomes enforceable by the holder for value against all the accommodation indorsers.[3] And until it has been negotiated, the accommodation indorser may rescind his obligation, and demand a surrender of the instrument or a cancellation of his signature.[4]

[1] Hawkes *v.* Phillips, 7 Gray, 284; McNaught *v.* McClaughry, 42 N. Y. 22; Williams *v.* Perkins, 21 Ark. 18.

[2] Tenney *v.* Price, 7 Pick. 243.

[3] French *v.* Bank of Columbia, 4 Cranch, 59, 141; Violett *v.* Patton, 5 Cranch, 142; Yeaton *v.* Bank of Alexandria, 5 Cranch, 49; Stephens *v.* Monongahela N. B., 88 Pa. St. 157; Faut *v.* Miller, 17 Gratt. 47; Robertson *v.* Williams, 5 Munf. 381; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392; Downes *v.* Richardson, 5 Barn. & Ald. 674; Whitworth *v.* Adams, 5 Rand. 342; May *v.* Boisseau, 8 Leigh, 164.

[4] May *v.* Boisseau, 8 Leigh, 164; Smith *v.* Wyckoff, 3 Sandf. Ch. 79 Dogan *v.* Dubois, 2 Rich. Eq. 85. And a subsequent holder cannot recover of the party so revoking his signature, if he had notice of the revocation, before he paid for the note. Dogan *v.* Dubois, *supra;* May *v.* Boisseau, *supra.*

Inasmuch as the authority given to the accommodated party to bind the others by a negotiation of the paper, is of the nature of a power of attorney, it has been held that the death of the accommodating party revokes his signature, when it occurs before the negotiation of the paper.[1] It seems to be doubtful whether there is such an implied revocation of the signature ;[2] but it is certainly true that the death of the accommodating party cannot operate as a revocation as against a *bona fide* holder for value.[3] The fact that the holder for value knows that the instrument is accommodation paper does not affect the liability of the accommodation indorser or acceptor, for the money paid out in negotiation of the paper is sufficient consideration to bind all those who have already signed.[4] And it seems that no objection can be raised to the title of the *bona fide* holder for value, because the paper had been negotiated after maturity.[5] But, of course, no action can be maintained on accommodation paper by one who is a holder without value and with notice.[6]

The accommodation paper may also be pledged as security, unless restrictions are placed upon its use; and the pledgee is deemed to be a holder for value, and may sue the accommodating parties on the paper.[7] But where the

[1] Smith *v.* Wyckoff, 3 Sandf. Ch. 94.

[2] Williams *v.* Bosson, 11 Ohio, 66.

[3] Clark *v.* Thayer, 105 Mass. 216.

[4] Smith *v.* Knox, 3 Esp. 47; Charles *v.* Marsden, 1 Taunt. 224; Fentum *v.* Pocock, 5 Taunt. 193; Jewell *v.* Parr, 16 C. B. 684; L. R. 2 Exch. 56; Grant *v.* Ellicott, 7 Wend. 227; Brown *v.* Mott, 7 Johns. 361; Arnold *v.* Sprague, 34 Vt. 402; Best *v.* Nokomis Nat. Bank, 76 Ill. 608; Washington Bank *v.* Kaum, 15 Iowa, 53; Thatcher *v.* West River N. B. 19 Mich. 196; Spurgeon *v.* McPheeters, 42 Ind. 527; Cady *v.* Shepherd, 12 Wis. 713; Harris *v.* Bradley, 7 Yerg. 310; Hawkins *v.* Neal, 60 Miss. 256; Kracht *v.* Obst, 14 Bush, 34; Austin *v.* Boyd, 24 Pick. 64.

[5] Seyfert *v.* Edison, 16 Vroom, 393.

[6] Powers *v.* French, 1 Hun, 582; Brooks *v.* Hay, 23 Hun, 372; Robertson *v.* Williams, 5 Munf. 381.

[7] Matthews *v.* Rutherford, 7 La. Ann. 225; Washington Bank *v.* Krum,

accommodation paper has been pledged as security, only the amount of money actually due and secured by it can be recovered of the parties to the paper.[1] And where such paper is pledged to secure the payment of an existing debt, a fresh consideration is needed to support the liability of the parties to the paper; but the surrender of other security would be a sufficient consideration.[2]

§ 159. **Kinds of consideration, good and valuable.**— Considerations are divided by the writers upon contracts into two principal classes, good and valuable. A good consideration is the natural love and affection of near relations, which prompts the promises and bestowals of benefits. And a valuable consideration may be anything which has a pecuniary value. It is, therefore, either money or money's equivalent. But a note or other instrument of indebtedness can only sustain an action, when it is based on a valuable consideration. A good consideration, natural love and affection, is not sufficient to support any executory contract, except in deeds under the statute of uses.[3] A note or bill or check, given by a father to his son, or by the son to an aged parent, in consideration of natural love and affection, cannot be sued on, as long as it does not pass into the hands of a holder for value.[4] And where a

15 Iowa, 53; Appleton *v.* Donaldson, 3 Pa. St. 386. Knowledge of the character of the paper will not affect the title of the pledgee, or of the purchaser from the pledgee. Ransom *v.* Turley, 50 Ind. 273.

[1] Atlas Bank *v.* Doyle, 9 R. I. 76; Gordon *v.* Boppe, 55 N. Y. 665; Buchanan *v.* International Bank, 78 Ill. 500.

[2] Depeau *v.* Waddington, 6 Whart. 219.

[3] Tiedeman, Real Prop., § 444.

[4] Milnes *v.* Dawson, 5 Exch. 948; Hill *v.* Wilson, L. R. 8 Ch. App. 894; Holliday *v.* Atkinson, 5 B. & C. 401; *s. c.* 8 D. & R. 163; Tate *v.* Hilbert, 2 Ves. Jr. 111; Woodbridge *v.* Spooner, 3 B. & Ald. 235; Mullen *v.* Rutland, 55 Vt. 77; Parker *v.* Carter, 4 Munf. 273; Rice *v.* Rice, 68 Ala. 216; Johnson *v.* Griest, 85 Ind. 503; Hill *v.* Buckminster, 5 Pick. 391; Pennington *v.* Gittings, 2 Gill & J. 208; Fink *v.* Cox, 18 Johns. 145;

note, given in consideration of love and affection, is surrendered for another note, the want of a valuable consideration will render the latter note invalid.[1] And as a matter of course, any commercial instrument, supported only by a good consideration, may be revoked and cancelled.[2]

But it has been held that a request, written at the bottom of a note, that the payee will accept the note as an expression of friendship, is not conclusive that the note was without consideration, although the note was sealed up and the payee was requested not to open it until his death.[3] The want of consideration cannot be proved by evidence of the pecuniary condition of the payee or of any other party.[4]

§ 160. **Donatio mortis causa of one's own paper.**— Although it has been held by a few early cases that the maker of commercial paper may make a valid gift of such paper to take effect on his death, based upon a good consideration,[5] it is the generally accepted rule of law that

Hamor *v.* Moore, 8 Ohio St. 239; Kirkpatrick *v.* Taylor, 43 Ill. 207. In Edwards *v.* Davis, 16 Johns. 282, the note was given by a son for necessaries which had been furnished to the father. In West *v.* Cavins, 74 Ind. 265, the note was given to offset an inequality in the will of the maker, and in Foust *v.* Board of Publication, 8 Lea, 552, to aid a church in the furtherance of its charitable interests. See also Hardin *v.* Wright, 32 Mo. 452; Harris *v.* Harris, 69 Ind. 181; Peabody, Guardian, *v.* Peabody, 69 Ind. 556.

[1] Copp *v.* Sawyer, 6 N. H. 386; Hill *v.* Buckminster, 5 Pick. 391. But see *contra*, Dawson *v* Kearton, 3 Sm. & Giff. 186.

[2] Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457; Second Nat. Bank *v.* Williams, 13 Mich. 282; Hewitt *v.* Kaye, L. R. 6 Eq. 198.

[3] Dean *v.* Carruth, 108 Mass. 242.

[4] Hartman *v.* Shaffer, 71 Pa. St. 312.

[5] In Bowers *v.* Hurd, 10 Mass. 427, where the note was left in escrow, to be delivered at the maker's death, and to operate as a legacy, overruled by Hill *v.* Buckminster 5 Pick. 391. See also Wright *v.* Wright, 1 Cow. 598. In Worth *v.* Case, 42 N. Y. 362, a note without consideration was delivered by the maker to the payee in a sealed envelope, with instructions not to open until the maker's death; and the note was held to be binding upon the estate of the maker, even as against the payee.

such a gift does not differ in character from an ordinary gratuitous promise, and is therefore invalid, because it is not supported by a valuable consideration.[1] But if there is a valuable consideration in addition to that of love and affection, the note will be good; and if a part of the note is based upon the valuable, and a part upon the good, consideration, only the latter part of the note will be void.[2]

It is also held in Louisiana, that since a check is there considered to be the equivalent of money, *i.e.*, that the check operates as an assignment *pro tanto* of the fund on deposit,[3] the drawer may make an absolute gift of his check, and the check will not be revoked by the death of the drawer.[4]

§ 161. **Subscriptions to charitable objects.** — It has been frequently held by the courts that a note or other commercial instrument, given for the furtherance of some charitable object, to found a college or hospital, to support a church and its pastor, and the like — is binding upon the maker;[5] some, on the ground that the donees have incurred responsibilities in reliance upon the payment of the notes;[6] and others, because two or more joined in the subscription, and the promise of one subscriber is declared to be

[1] Loring *v.* Sumner, 23 Pick. 98; Carr *v.* Silloway, 111 Mass. 24; Warren *v.* Durfee, 126 Mass. 338; Flint *v.* Pattee, 33 N. H. 520; Halley *v.* Adams, 16 Vt. 206; Smith *v.* Kittridge, 21 Vt. 238; Raymond *v.* Sellick, 10 Conn. 480; Craig *v.* Craig, 3 Barb. Ch. 76; Harris *v.* Clark 2 Barb. 94; *s. c.* 3 N. Y. 93; Phelps *v.* Phelps, 28 Barb. 121; Phelps *v.* Pond, 23 N. Y. 69; Whitaker *v.* Whitaker, 52 N. Y. 368.

[2] Parish *v.* Stone, 14 Pick. 198; Woodbridge *v.* Spooner, 3 B. & Ald. 235; Forbes *v.* Williams, 15 Bradw. 305.

[3] See *post*, § 452.

[4] Burke *v.* Bishop, 27 La. Ann. 465. See *post*, § 448.

[5] Trustees of Orphan School *v.* Fleming, 10 Bush, 234; Collier *v.* Baptist Educational Society, 8 B. Mon. 68; Roche *v.* Roanoke Seminary, 56 Ind. 198.

[6] Amherst Academy *v.* Cowles, 6 Pick. 427; Simpson College *v.* Bryan, 50 Iowa, 293.

the consideration for the promise of the other.[1] But the authorities are not agreed, and there are cases, which deny that such a note or obligation is binding.[2]

§ 162. **Moral obligations, when sufficient.** — As has been already explained, a mere moral obligation can never be a sufficient consideration for a note, not even when the obligation arises out of the bestowal of benefits, in reliance on the promise of remuneration. This is true in all cases, where the obligation to pay is void according to the law. Whenever public policy interdicts a contract, it is declared to be absolutely void, and the moral obligation arising out of the void contract cannot support a subsequent promise to pay; but if the contract is interdicted or invalidated, not on account of public policy, but for the protection of one individual from the overreaching of another, the contract is declared to be only voidable at the instance of the person for whose protection the law interposed its prohibition.[3]

Thus, the debts of a married woman, being absolutely void at law, cannot be made the consideration of her notes, executed by her after her husband's death, at least in those States, where the common-law disability of coverture still exists.[4] On the other hand, a promissory note made by one, after reaching his majority, for debts contracted dur-

[1] George *v.* Harris, 4 N. H. 533; Roberts *v.* Cobb, 31 Hun, 158.

[2] Boutell *v.* Cowdin, 9 Mass. 254, where the note was given for the benefit of a church and for the support of its pastor; Pratt *v.* Trustees of Baptist Society, 93 Ill. 475, where the note was given for the purchase of a church bell.

[3] Eastwood *v.* Kenyon, 11 Ad. & El. (39 E. C. L. R.) 438; Littlefield *v.* Shee, 2 Barn. & Adol. 811.

[4] Littlefield *v.* Shee, 2 B. & Ad. 811; Hayward *v.* Barker, 52 Vt. 429. But see, *contra*, Goulding *v.* Davidson, 26 N. Y. 604; Barton *v.* Beer, 35 Barb. 78; Hubbard *v.* Bugbee, 55 Vt. 506; Spitz *v.* Fourth Nat. Bank, 8 B. J. Lea. 641.

ing infancy,[1] or given for an usurious debt, either before or after the repeal of the law against usury,[2] have been sustained as binding on the promisors.

It has also been held that the note of a bankrupt after his discharge for an antecedent debt is binding on him,[3] although it has been maintained by some of the courts that the old debt is not a sufficient consideration.[4] In the same manner an oral contract, which is invalid under the statute of frauds, is a sufficient consideration for a promissory note or bill.[5] So, likewise, is a debt barred by the statute of limitations.[6] So, also, the liability of a surety on a note barred by the statute is sufficient consideration for a new

[1] Hawkes *v.* Saunders, Cowp. 289; Eastwood *v.* Kenyon, 11 Ad. & El. (39 E. C. L. R.) 438.

[2] Flight *v.* Reed, 22 L. J. Exch. 265; *s. c.* 1 H. & C. (S. S.) 708; State Bank *v.* Ayres, 2 Halst. 130; Turner *v.* Hulme, 4 Esp. 11; Morris *v.* Taylor, 6 C. E. Green, 439, 606; De Wolf *v.* Johnson, 10 Wheat. 367.

[3] Way *v.* Sperry, 6 Cush. 238; Trueman *v.* Fenton, Cowp. 544; Merriam *v.* Bayley, 1 Cush. 77; Scouton *v.* Eislord, 7 Johns. 36; Hockett *v.* Jones, 70 Ind. 229; Wiggins *v.* Keizer, 6 Ind. 252; Erwin *v.* Saunders, 1 Cow. 249; McNair *v.* Gibbert, 3 Wend. 344; Shippey *v.* Henderson, 14 Johns. 178. But the note will not be binding if it is made in pursuance of a corrupt agreement of the payee made prior to the discharge. Trumball *v.* Tilton, 21 N. H. 129. See also Penn *v.* Bennett, 4 Campb. 205; Maxim *v.* Morse, 8 Mass. 127; Depuy *v.* Swart, 3 Wend. 135; Moore *v.* Viele, 4 Wend. 420. But see Snevily *v.* Reed, 9 Watts, 396, in which it was held that, although a check given for the debtor's release from imprisonment is valid, a note for the amount of the debt would not be binding, where the debt has been discharged by a *capias ad satisfaciendum*.

[4] White *v.* Wardwell, 1 Root (Me.), 309; Walbridge *v.* Harron, 18 Vt. 448.

[5] Jones *v.* Jones, 6 M. & W. 84; Hooker *v.* Knab, 26 Wis. 511; Rogers *v.* Stevenson, 16 Minn. 68; Schneco *v.* Meier, 4 Mo. App. 566.

[6] Eastwood *v.* Kenyon, 11 Ad. & El. 438; McGrath *v.* Barnes, 13 S. C. 328; Giddings *v.* Giddings, 51 Vt. 221; Wennall *v.* Adney, 3 Bos. & P. 249; Hyling *v.* Hastings, Ld. Raym. 389; Latouche *v.* Latouche, 3 H. & C. 576. See *contra*, Brierly *v.* Tanner, 28 La. Ann. 245. The ignorance of the maker that the debt was barred does not affect the question. Buckner *v.* Clark, 6 Bush, 168. But a fraudulent misrepresentation in respect to the running of the statute, will invalidate the note. Cross *v.* Herr, 96 Ind. 96.

note.[1] But a barred debt of the father will not be a sufficient consideration for the son's obligation.[2]

A note is also good, which is given to reimburse one who has voluntarily paid the debt of the maker.[3] But although a simple release of a debt does not destroy the liability of the debtor, unless based upon a sufficient consideration, and therefore a note given to pay this debt so released is binding without any new consideration;[4] yet, if the release of the debt, or of a part of it, is the result of a compromise of disputed claims, the released debt cannot form the consideration of any subsequent note or other commercial instrument.[5]

The loss suffered from the payment of a debt in the depreciated Confederate currency, during the civil war of the United States, is not a sufficient consideration for a note given subsequently.[6]

§ 163. **Money considerations — Contemporary loans and future advances.** — The most common consideration of contracts in general and particularly of commercial paper, is money. There is no doubt as to the sufficiency of a money consideration, where the money is paid over simultaneously with the execution of the paper,[7] or promised to be

[1] Mills *v.* Linnell, 97 Mass. 298. But see *contra*, Clark *v.* Hampton, 1 Hun, 612, in respect to the guaranty of a barred note.

[2] Clement *v.* Segur, 29 La. Ann. 798, overruling Matthews *v.* Williams, 25 La. Ann. 585.

[3] Hayes *v.* Warner, 2 Str. 933; Stokes *v.* Lewis, 1 T. R. 20.

[4] See Willing *v.* Peters, 12 Serg. & R. 177; Stafford *v.* Bacon, 25 Wend. 384; Valentine *v.* Foster, 1 Metc. 520; Snevely *v.* Read, 9 Watts, 396.

[5] Warner *v.* Whitney, 24 Me. 561; Phelps *v.* Dennett, 57 Me. 491; Montgomery *v.* Lampton, 3 Metc. (Ky.) 519; Hale *v.* Rice, 124 Mass. 292; Stafford *v.* Bacon, 1 Hill, 538; Ingersoll *v.* Martin, 58 Md. 67; Mason *v.* Campbell, 27 Minn. 54.

[6] Craus *v.* Hunter, 28 N. Y. 389.

[7] Griswold *v.* Davis, 31 Vt. 390; Allaire *v.* Hartshorne, 1 Zab. 665; Curtis *v.* Mohr, 18 Wis. 645; Savings Assn. *v.* Hunt, 17 Kan. 532.

paid in the future. If the promise to pay in the future is a binding obligation, the note given in consideration of it is absolutely binding to the amount of the advances made under this promise. A common case of this kind is the deposit of a note or bill with a banker to be discounted and and drawn against. If the right to draw against it is made absolute, it is a sufficient consideration to make the banker or bank a holder for value.[1] But where the obligation to honor drafts against the amount of the note or bill is not absolute, the bank or banker is only a holder for value to the amount of the drafts that had been honored.[2]

The indorsement of a note, as a credit on an unbalanced account, is founded upon a sufficient consideration,[3] and so, also, is a note transferred as collateral for a fluctuating account. In such a case, the transferee is a holder for value to the amount of the balance at any time found due.[4] But the *prima facie* presumption is always that the note or other paper is collateral only for the balance due at the time it is given, and this presumption must be rebutted by evidence of an intention to cover all future balances.[5]

The liability of a surety is also a sufficient consideration for an independent note given to the holder of the old note or other instrument of indebtedness; in settlement of the collateral obligation.[6] And so, likewise, is the promise of

[1] Platt *v.* Beebe, 57 N. Y. 339; Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553; Melvin *v.* Fellows, 33 N. H. 401.

[2] Fulton Bank *v.* Phœnix Bank, 1 Hall 619; McBride *v.* Farmers' Bank, 26 N. Y. 450.

[3] Davenport *v.* Elliott, 10 Kan. 592.

[4] Pease *v.* Hirst, 10 B. & C. 122; *s. c.* 5 M. & Ry. 99; Collenridge *v.* Farquharson, 1 Stark. 259; Richards *v.* Macey, 14 M. & W. 484; Bank of Metropolis *v.* New England Bank, 1 How. 234; *s. c.* 17 Pet. 174.

[5] Byles on Bills, 128; Bosanquet *v.* Dudman, 1 Stark. 1; Bolland *v.* Bygrave, 1 R. & M. 271. See Atwood *v.* Crowdie, 1 Stark. 483; Woodroffe *v.* Hayne, 1 C. & P. 600, in which it was held that the balance of account was sufficient to bind an accommodation acceptor to the payee.

[6] Blankenship *v.* Nimmo, 50 Ala. 506.

a surety, to pay the debt for which he is liable, a sufficient consideration for the note given to him by the principal debtor.[1] So, also, will an arbitrator's award be a sufficient consideration for a note given contingent on the award.[2]

Not only is a debt, contracted at the time, a sufficient consideration for the instrument executed and delivered by the debtor in testimony thereof, but it is likewise sufficient to make the creditor a *bona fide* holder for value of any commercial paper, payable to the debtor, or held by him as bearer, which he indorses over to the creditor as collateral security. This is but a special application of a very common rule.[3]

§ 164. **Existing debt as a consideration.** — It has been generally held that an existing debt is a sufficient consideration for a note or other commercial instrument. This is true, whether the existing debt is an open account or one resting on an implied contract,[4] or whether it is evidenced by an old instrument of indebtedness, which is surrendered for the new instrument. Where the two instruments are of the same character and tenor, the exchange is called a re-

[1] Little *v.* Little, 13 Pick. 426.

[2] Woodrow *v.* O'Connor, 28 Vt. 776.

[3] Griswold *v.* Davis, 31 Vt. 390; Chicopee Bank *v.* Chapin, 8 Me. 40; Williams *v.* Smith, 2 Hill, 301; Perdon *v.* Jones, 2 E. D. Smith, 106; Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553; Exchange Bk. *v.* Butner, 60 Ga. 654; Mechanics' Association *v.* Ferguson, 29 La. 549; Louisiana State Bank *v.* Gaienne, 21 La. Ann. 551; Jenkins *v.* Schaub, 14 Wis. 1; Lyon *v.* Ewing, 17 Wis. 70; Curtis *v.* Mohr, 18 Wis. 619; Bowman *v.* Van Kusen, 29 Wis. 219; State Savings Assn. *v.* Hunt, 17 Kan. 532; Best *v.* Crall, 23 Kan. 482; Munn *v.* McDonald, 10 Watts, 270; Slotts *v.* Byers, 17 Iowa, 303.

[4] Faulkner *v.* Faulkner, 73 Mo. 327; Estes *v.* Simpson, 13 Nev. 472; Davenport *v.* Elliott, 10 Kan. 592; Platt *v.* Beebe, 57 N. Y. 339; Bank of N. Y. *v.* Vanderhorst, 32 N. Y. 553; Robson *v.* McKoin, 18 La. Ann. 544; Griffiths *v.* Parry, 16 Wis. 231; Haycock *v.* Rand, 5 Cush. 26; Brown *v.* North, 21 Mo. 528; Hammat *v.* Emerson, 27 Me. 308; Coburn *v.* Ware, 30 Me. 202.

newal. The surrender of the old constitutes the consideration of the new instrument.[1] In the case of renewals, the consideration of the original paper is transferred to the renewal;[2] and if the consideration was originally defective or was extinguished by payment of the original paper, the renewal is void for the want of a consideration.[3] But where a bill or note is given to an indorsee of a commercial instrument for value and without notice, to take up and cancel the latter instrument, any defects in the consideration of the paper so cancelled would not affect the binding effect of the new note or bill, since the defense of want of consideration could not be set up against the indorsee even in an action on the old paper.[4]

§ 165. **Existing debts, consideration for indorsement of commercial paper.** — Not only is the existing debt held to be a sufficient consideration for the execution or acceptance of commercial paper, but also for the indorsement of commercial paper; at least, when the transfer by indorsement is made in payment of the debt,[5] whether the written evidence of the debt is surrendered, or only

[1] Swift *v.* Tyson, 16 Pet. 1; Townsley *v.* Samrall, 2 Pet. 170; Brown *v.* Leavitt, 31 N. Y. 113; Mechanics' Bank *v.* Crow, 60 N. Y. 85; Cowing *v.* Altman, 71 N. Y. 435; O'Keefe *v.* Handy, 31 La. Ann. 832; Dunn *v.* Weston, 71 Me. 270; Howard *v.* Hinchley Iron Co., 64 Me. 93; Montrose *v.* Clark, 2 Sandf. 115; Pratt *v.* Coman, 37 N. Y. 440; Hodge *v.* First Nat. Bank, 22 Gratt. 51; Meyer *v.* Spence, 9 Mo. App. 590; Muirhead *v.* Kirkpatrick, 21 Pa. St. 237; Gates *v.* Union Bank, 12 Heisk. 325; Lott *v.* Dysart, 45 Ga. 355.

[2] Howard *v.* Hinckley Iron Co., 64 Me. 93; Gates *v.* Union Bank, 12 Heisk. 325.

[3] Smith *v.* Taylor, 39 Me. 242.

[4] Estep *v.* Burke, 19 Ind. 87.

[5] Swift *v.* Tyson, 16 Pet. 1; Emanuel *v.* White, 34 Miss. 56; Brown *v.* Leavitt, 31 N. Y. 113; Mechanics' Nat. Bank *v.* Crow, 60 N. Y. 85; Mayer *v.* Mode, 14 Hun, 155; Struthers *v.* Kendall, 41 Pa. St. 214; Cole *v.* Saulpaugh, 48 Barb. 104; Pond *v.* Waterloo Agric. Works, 59 Iowa, 695; Ives *v.* Farmers' Bank, 2 Allen, 236; Norton *v.* Waite, 20 Me. 175;

cancelled.[1] It is also a sufficient consideration, where the paper is transferred in *part payment* of an existing debt.[2] The surrender of the right of action on the existing debt entirely or in part, is in every such case the consideration for the indorsement of the paper.[3] But

Homes *v.* Smyth, 16 Me. 117; Smith *v.* Van Loan, 16 Wend. 659; Cecil Bank *v.* Heald, 25 Mo. 562; Marbled Iron Works *v.* Smith, 4 Duer, 362; Gould *v.* Segee, 5 Duer, 260; Stevenson *v.* Hyland, 11 Minn. 198; Williams *v.* Little, 11 N. H. 66; Russell *v.* Hadduck, 8 Ill. 233; Bardsley *v.* Delp, 88 Pa. St. 420; Robinson *v.* Lair, 31 Iowa, 9; McCaskey *v.* Sherman, 24 Conn. 605; Bond *v.* Central Bank, 2 Ga. 92; Barney *v.* Earle, 13 Ala. 106; Soule *v.* Shotwell, 52 Miss. 236; Bank of St. Albans *v.* Gilliland, 23 Wend. 311; Bank of Sandusky *v.* Scoville, 24 Wend. 115.

[1] Bank of Salina *v.* Babcock, 21 Wend. 499, Nelson, C. J: "The court ought not to speculate about the probability of reviving these canceled securities in case the paper, upon the strength of which they were canceled, should turn out to be unavailable, much less ought we to go into a calculation of the chances of revival as the ground of defeating the substituted security. It is enough that the plaintiffs in good faith charged over and canceled them according to usage and held them merely to be sent home. This is parting with value in the strictest sense of the term." See also Dixon *v.* Dixon, 31 Vt. 450. But see Clothier *v.* Adriance, 51 N. Y. 322.

[2] Purchase *v.* Mattison, 3 Bosw. 310.

[3] Phœnix Ins. Co. *v.* Church, 81 N. Y. 225, Andrews, J.: "In view of this long line of authorities it must be regarded as the settled doctrine in this State that the surrender by the creditor of the past due notes of a debtor, upon receiving from him in good faith, before maturity, the note of a third person in place of the note surrendered, constitutes the creditor a holder for value of the note thus taken and protects him against the defenses and equities of the antecedent parties, and that it is immaterial whether the note surrendered was given for goods sold or money loaned, or under circumstances which would leave the original debt represented by the note in existence enforceable against the debtor, or whether by surrendering the note, the creditor parted with his entire right of action." See also Mix *v.* Nat. Bank, 91 Ill. 20; Worcester Nat. Bank *v.* Cheney, 87 Ill. 602; Manning *v.* McClure, 36 Ill. 490; Bush *v.* Peckard, 3 Harr. 385; Carlisle *v.* Wishart, 11 Ohio 172; Bostwick *v.* Dodge, 1 Doug. (Mich.) 413; Stevens *v.* Campbell, 13 Wis. 315; Braush *v.* Scribner, 11 Conn. 388; Kellogg *v.* Fancher, 23 Wis. 21; Bank of Republic *v.* Carrington, 5 R. I. 515; Mayberry *v.* Morris, 62 Ala. 116; Vatterlien *v.* Howell, 4 Sneed, 441; King *v.* Doolittle, 1 Head, 77; Wormley *v.* Lowry, 1

there are a few authorities which deny that there is in such such cases any consideration sufficient to make the indorsee a holder for value.[1]

The New York cases make a distinction between *absolute* and *conditional* security holding that only when the payment is absolute, is the indorsee of the paper, with which the payment is made, a holder for value. They hold that when a note, or check, or other commercial instrument is delivered to the creditor in payment of the original note or bill, and the latter instrument is not canceled and delivered up, the creditor intending to hold on to his original rights of action, until it can be ascertained whether the instrument taken in payment is paid or not, the creditor is not a holder for value, and is not protected against the equities,[2] the conclusion of the courts resting on the claim that the conditional payment differs in nothing from a pledge of commercial paper as collaterals. But those courts, which recognize the pledgee of commercial paper to be in every instance a holder for value, do not recognize this distinction between absolute and conditional payment as at all essential; and wherever it is recognized at all, the conditional payment has been held to be a sufficient consideration.[3]

Humph. 468; Reddick *v.* Jones, 6 Ired. 107; Hodges *v.* Black, 8 Mo. App. 389; May *v.* Quinby, 3 Bush, 96; McKnight *v.* Knisley, 25 Ind. 336.

[1] Buhrman *v.* Bayles, 21 N. Y. S. C. (14 Hun) 608; Weaver *v.* Border, 49 N. Y. 293; Smith *v.* DeWitts, 6 D. & R. 120; Ingerson *v.* Starkweather, Walker, 346; Ingram *v.* Morgan, 4 Humph. 66; Cardwill *v.* Hicks, 37 Barb. 458; Scott *v.* Ocean Bank, 23 N. Y. 289.

[2] Phœnix Ins. Co. *v.* Church, 81 N. Y. 218; Bright *v.* Judson, 47 Barb. 29; Farrington *v.* Frankfort Bank, 24 Barb. 554; New York Exch. Co. *v.* De Wolf, 3 Bosw. 86.

[3] In Currie *v.* Misa, L. R. 10 Exch. 153, Lush, J., said: "The title to a bill on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the court of Common Pleas in Belshaw *v.* Bush (11 C. B. 191), as the foundation of the judgment in that case,

§ 166. **Commercial paper as collateral security.** — But when the paper is transferred, not for the purpose of making an absolute payment of an existing debt, but merely to secure its payment in the future, it is difficult to state what the conclusions of the authorities are; and the grounds of these conclusions vary with the facts of each case. But in respect to some of the cases, the authorities are agreed. If commercial paper is transferred as collateral security for an existing debt, and at the time that it is transferred, other security is surrendered, the surrender of the latter makes the creditor a holder for value of the paper indorsed by him.[1] The surrender of one collateral is a good consideration for the transfer of another, even though the former is worthless and the debt is not yet due.[2] There is a specially strong consideration for the new collaterals, where not only the prior securities, but also the written evidence of the existing debt, are surrendered, when the new collaterals are indorsed.[3] So, also, where at the same time, the creditor agrees to give further time to the debtor. Forbearance to sue is a good consideration

namely that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives, if the security is not realized. This is precisely the effect which both parties intended the security to have; and the doctrine is as applicable to one species of security as to another, to a check payable on demand as to a running bill or a promissory note payable to order or bearer."

[1] Meads *v.* Merchants' Bank, 25 N. Y. 143; Justh *v.* Nat. Bank of Commonwealth, 53 N. Y. 478; Chrysler *v.* Renois, 43 N. Y. 209; Park Bank *v.* Watson, 42 N. Y. 490; Le Breton *v.* Pierce, 2 Allen, 8; Allaire *v.* Hartshorne, 1 Zab. 665; Stevens *v.* Campbell, 13 Wis. 375; First Nat. Bank *v.* Bentley, 27 Minn. 87; Knox *v.* Clifford, 38 Wis. 651; Nichols *v.* Bate, 10 Yerg. 429; Mohawk Bank *v.* Corey, 1 Hill, 513; Youngs *v.* Lee, 12 N. Y. 551; Pratt *v.* Coman, 37 N. Y. 440; Heath *v.* Silverthorn Mining Co., 39 Wis. 146.

[2] Park Bank *v.* Watson, 42 N. Y. 490. See Stevens *v.* Corn Exch. Bank, 3 Hun, 150; Huff *v.* Wagner, 63 Barb. 215.

[3] Emanuel *v.* White, 34 Miss. 56.

in itself.[1] The following quotation from the opinion of the court in the leading case of Goodman *v.* Simonds,[2] will aptly serve to present the strong grounds upon which these rulings are based. In the settlement of an existing debt, already due, prior securities were surrendered on the receipt of new notes of the debtor, secured by a bill which matured twelve or fifteen days after the notes. Clifford, J., said: "When the settlement was made the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already overdue, and a forbearance to enforce remedies for its recovery; and the implication is very strong that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration.[3] The surrender of other

[1] Kingsland *v.* Pryor, 33 Ohio St. 19; Worcester Nat. Bank *v.* Cheney, 87 Ill. 602; Grocers' Bank *v.* Penfield, 7 Hun, 279; Manning *v.* McClure, 36 Ill. 498; Benman *v.* Millison, 58 Ill. 36; Francia *v.* Joseph, 3 Edw. Ch. 182; Paulette *v.* Brown, 40 Mo. 54; Webster *v.* Bainbridge, 13 Hun, 180; Holzworth *v.* Koch, 26 Ohio St. 33; York *v.* Pearson, 63 Me. 587; Thompson *v.* Gray, 63 Me. 228; Fellow *v.* Prentis, 3 Denio, 520; Atkinson *v.* Brooks, 26 Vt. 574; Mix *v.* Nat. Bank, 91 Ill. 20; Andrews *v.* Marrett, 58 Me. 539; Swift *v.* Tyson, 16 Pet. 1; Okie *v.* Spencer, 2 Whart. 253. Forbearance to issue an attachment has been held to be insufficient. Boone *v.* Tharp, Iowa (1884), ; Oates *v.* National Bank, 100 U. S. 239. See Fenonille *v.* Hamilton, 35 Ala. 319. An agreement "to allow the loan to remain a little longer" too indefinite to be a sufficient consideration. Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235.

[2] 20 How. 243.

[3] Etting *v.* Vanderlyn, 4 Johns. 237; Morton *v.* Burr, 7 Ad. & El. 19; Baker *v.* Walker, 14 Mees. & Wels. 465; Jennison *v.* Stafford, 1 Cush. 168; Walton *v.* Mascall, 13 Mees. & Wels. 453; Wheeler *v.* Slocum, 16 Pick. 62.

instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute. [1]

"It seems now to be agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties — at least to the extent of the previous debt for which it is held as collateral.[2] And the better opinion seems to be in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and consequently whatever would have given validity to the bill between the original parties is sufficient to uphold a transfer like the one in this case. We are not aware that the principle, as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause." [3]

[1] Citing Dupeau *v.* Waddington, 6 Whart. 220; Hornblower *v.* Proud, 2 Barn. & Ald. 327; Rideout *v.* Bristow, 1 Cromp & Jer. 231; Bank of Salina *v.* Babcock, 21 Wend. 499; Youngs *v.* Lee, 12 N. Y. 551.

[2] Citing White *v.* Springfield Bank, 3 Sand. (S. C.) 222; New York M. Iron Works *v.* Smith, 4 Duer, 362.

[3] In Atkinson *v.* Brooks, 26 Vt. 574, Redfield, C. J., said: "The transaction possesses both the cardinal ingredients of a valuable consideration: it is a detriment to the promisee, and an advantage to the promisor. And it is no satisfactory answer to say, that the party who takes such a bill or note is in the same condition he was before. This is by no means certain. He has for the time foregone the collection of his debt, and in such matters time is of the essence of the transaction. And the debtor thereby gains — it may be more or less but of necessity some time is thereby gained: and in such matters this is always accounted an advantage, and is often of the most vital consequence to the debtor."

§ 167. **When agreement for delay may be implied as the consideration.** — Not only would forbearance be a sufficient consideration to make the indorsee of collaterals a holder for value, when the forbearance is provided for by express agreement; but, also, when it can be fairly implied from the nature of the transaction. And it has been held in more than one case, that when collaterals are given for securing the payment of an overdue debt, there is an implied agreement for delay in payment until the collaterals mature. If an agreement for delay is not to be implied in such a case, it is difficult to see what reason can be assigned for the transfer of the collaterals. Embarrassed debtors are not in the habit of furnishing collateral security for their overdue obligations, unless they expect to gain some benefit. Circumstances may exist, under which it would not be fair to imply an agreement for delay from the fact that the debt was already due when the collateral was given; as, for example, when for the sake of friendship an insolvent debtor may wish to secure one of his creditors. But these circumstances are unusual; and, as a general rule, the debtor does expect forbearance to sue, as a result of giving the security.[1] But there are authorities which deny

[1] In Manning *v.* McClure, 36 Ill. 498, Lawrence, J., said: "It is said that the position of the indorsee, in cases of this kind, is not different from that of a general assignee for the benefit of creditors. What we have already said shows wherein, in our opinion, the difference consists. In the case of a general assignment, there is no ground for presuming forbearance as one of the objects, or any implied agreement to forbear on the part of the creditors. Indeed, these general assignments are ordinarily made without the wish or knowledge of the creditors, and where the object is not fraud it is generally to secure an equal distribution of the assets. The assignee is a mere trustee to collect what may be due the assignor for the benefit of his creditors. We have stated why, in our opinion, the equity is with the indorsee, to wit, that by the almost universal usage of the world of commerce, a transaction of this sort is understood by the parties to imply further forbearance on the pre-existing debt, and thus the indorsee is lulled into a false security by means of an instrument which the person sought to be held liable has made and

that there is any implied agreement for delay, when collateral security not yet due is given for an overdue debt.[1] And it seems that in no case is an agreement for delay ever implied, where the amount of the collateral is less than that of the debt.[2]

It has also been held that the agreement for delay cannot be implied from the fact that the collateral matures

put into circulation." Blanchard *v.* Stevens, 3 Cush. 168, Dewey, J.: "All of the cases, those of the New York courts inclusive, concur in this, that if the party receiving the note parts with anything valuable, he is entitled to enforce the payment of the note, irrespective of the equities as between the original parties. But may you not as well show a legal consideration by showing forbearance to act as by showing an act done? A damage to the promisee is all that is necessary to show a consideration for a promise; and ought not the same rule to apply in protection of a note transferred to him? If the party had not received the note as collateral security, he might have pursued other remedies to enforce security or payment of his debt. He might have obtained other securities or perhaps payment in money. It is a fallacy to say that, if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed, not proved, and, from the very nature of the case, is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue or apparently dishonored, and without notice, actual or otherwise, of want of consideration or other defense thereto, whether in payment of a precedent debt, or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defense might not have been effectual as between the original parties thereto." See also to the same effect, Worcester Nat. Bank *v.* Cheney, 87 Ill. 602; Lewis *v.* Rogers, 2 Jones & S. 64; Thompson *v.* Gray, 63 Me. 228; Okie *v.* Spencer, 2 Whart. 253. See generally in reference to the implied extension of time of payment, Taylor *v.* Allen 36 Barb. 294; Eisner *v.* Keller, 3 Daly, 485; Andrews *v.* Marrett, 58 Me. 539; Hart *v.* Hudson, 6 Duer, 304; Fellow *v.* Prentiss, 3 Denio, 520; Pring *v.* Clarkson, 1 B. & C. 14; Kendrick *v.* Lomax, 2 Cr. & J. 405.

[1] Moore *v.* Ryder, 65 N. Y. 438; Sawyer *v.* Moran, 3 Tenn. Ch. 36; Richardson *v.* Rice, Tenn. (1878) ; Bowman *v.* Van Kuren, 29 Wis. 220.

[2] Michigan State Bank *v.* Leavenworth, 28 Vt. 209; Redfield & Bigelow's Lead. Cases, 203.

after the debt, when the transfer was made before the debt falls due. The debt must be overdue, when the collateral is indorsed, in order to raise the implication of an agreement for delay.[1] And the reasoning against the implication of such an agreement becomes stronger, when the collateral matures before the debt. There cannot possibly be an implied agreement under such a state of facts.[2] If the indorsee of such a collateral can be at all considered a holder for value, it must be on the ground that the mere pledge of a commercial instrument for an honest debt makes the pledgee a holder for value.[3]

§ 168. **Every pledge of commercial paper founded upon sufficient consideration.** — Where there is no express or implied agreement for forbearance, no surrender of other collaterals and no other specific consideration for the transfer of commercial paper as collaterals, it would seem, from the study of the general subject of consideration in the law of contracts, that the indorsee of such paper cannot be considered a holder for value. And such is the conclusion of some of the cases.[4] But very many of the

[1] Lewis *v.* Jones, 2 Jones & S. 64.

[2] Atkinson *v.* Brooks, 26 Vt. 574, Redfield, C. J.: "If one holds a debt due six months hence, and his debtor, as a mere volunteer service, indorses a current note or bill as collateral security, the collateral being due in three months, it could not be made to appear that such transaction, before the indorsee had been at any pains in the matter, was a contract upon consideration. The prior debt not being due, the creditor could forego nothing, and the debtor receive no advantage from the transaction. And the agreement to apply the collateral upon a debt not yet due, — being without consideration — would probably, in the first instance, be revocable at will, and so, also, as long as the parties remained in the same situation." See also Bowman *v.* Van Kuren, 29 Wis. 218.

[3] 1 Daniel's Negot. Inst., § 826. See *post*, § 168.

[4] Wagner *v.* Simmons, 61 Ala. 143; Goodman *v.* Simonds, 19 Mo. 106; Grant *v.* Kidwell, 30 Mo. 455; Brainard *v.* Davis, 2 Mo. App. 490; Napier *v.* Elam, 5 Yerg. 108; Buhrman *v.* Baylis, 14 Hun, 608; Chesbrough *v.* Wright, 41 Barb. 28; Rosa *v.* Brotherson, 10 Wend. 86; Ontario Bank

cases, both in England and in this country, hold that the mere pledge of commercial paper, without any specific consideration, for an honest debt makes the pledgee a holder for value; on the ground that the possession of an apparently reliable collateral gives the creditor a sense of security which relaxes his vigilance and prompts a leniency towards the debtor, which he would not otherwise manifest. Under these circumstances he may have overlooked other opportunities for collecting the debt; and in this way he suffers a detriment which constitutes a sufficient consideration for the pledge of the collateral.[1]

v. Worthington, 12 Wend. 600; Jones *v.* Schreyer, 49 N. Y. 674; Lawrence *v.* Clark, 36 N. Y. 128; Turner *v.* Tredway, 53 N. Y. 650; Comstock *v.* Hier, 73 N. Y. 269; Farrington *v.* Frankfort Bank, 24 Barb. 554; Cardwell *v.* Hicks, 37 Barb. 458; Lenheim *v.* Wilmarding, 55 Pa. St 73; Smith *v.* Hoagland, 78 Pa. St. 252; Royer *v.* Keystone Nat. Bank, 83 Pa. St. 248; Riley *v.* Johnson, 8 Ohio, 528; Reddick *v.* Jones, 6 Ired. 107; Rhea *v.* Allison, 3 Head, 176; Van Patton *v.* Beals, 46 Iowa, 62; Smith *v.* DeWitts, 6 D. & R. 120; Union Bank *v.* Barber, 56 Iowa, 559; De La Chaumette *v.* Bank of England, 9 B. & C. 208; Stewart *v.* Small, 2 Barb. 559.

[1] "We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment, and due notice in case of non-payment — an undertaking necessarily implied by becoming a party to the instrument — was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumes the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. * * * Our conclusion, therefore, is, that the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in the payment of such debt." Harlan, J., in B. C. & N. Railroad Co. *v.* National Bank of Republic, 102 U. S. 25. In the same case Clifford, J., said: "Bills and notes of the kind indorsed in blank, or payable to bearer, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer." "The holder is naturally lulled into security and inactivity by crediting the face of the note; and he should not be made to suffer by

§ 169. **The New York decisions.** — The decisions of the New York courts, on all the branches of the question which have been discussed in the paragraphs immediately preceding, are exceedingly confusing and very difficult to classify and arrange. A full discussion of the variations of opinion, manifested by them, would consume more space than is possible to devote to it, and a brief statement must suffice, which we quote from the author of "Negotiable Instruments." Mr. Daniel has classified them as follows:[1] "The transferee has been declared to be entitled to protection as a *bona fide* holder for value in the following instances: (1) Where the collateral note was taken for a loan contracted on the faith of its transfer;[2] (2) where the transferee of the note surrendered a security for the

the maker for confidence which his own promise created." 1 Daniel's Negot. Inst., § 831*a*. See also, to the same effect, Maitland *v.* Citizens' National Bank, 40 Md. 540; Straughan *v.* Fairchild, 80 Ind. 598; Ives *v.* Farmers' Bank, 2 Allen, 236; Blum *v.* Loggins, 53 Tex. 121; Stoddard *v.* Kimball, 6 Cush. 469; Chicopee Bank *v.* Chapin, 8 Met. 40; Blanchard *v.* Stevens, 3 Cush. 162; Allaire *v.* Hartshorne, 1 Zab. 665; Palmer *v.* Richards, 1 Eng. L. & Eq. 529; Roxborough *v.* Messick, 6 Ohio St. 448; Bertrand *v.* Barkman, 8 Eng. (Ark.) 150; Prentice *v.* Zane, 2 Gratt. 262; Cullum *v.* Branck Bank, 4 Ala. 21; Payne *v.* Bensley, 8 Cal. 260. In California the forfeiture of the rights to issue an attachment, which, by the provisions of the statute law, resulted from the taking of security, is held to be in all cases a sufficient consideration for the collateral. Naglee *v.* Lyman, 14 Cal. 355; Payne *v.* Bensley, 8 Cal. 260. See Percival *v.* Frampton, 2 C. M. & R. 180; *s. c.* 3 Dowl. 748; Foster *v.* Pearson, 1 C. M. & R. 849; *s. c.* 5 Tyrw. 255; Oates *v.* National Bank, 100 U. S. 239; Brush *v.* Scribner, 11 Conn. 388; Bridge City Bank *v.* Welch, 29 Conn. 475; Quinn *v.* Heard, 43 Vt. 375; Russell *v.* Splater, 47 Vt. 273; Bush *v.* Peckard, 3 Harr. 385; Outhwite *v.* Miner, 13 Mich. 533; Smith *v.* Lockridge, 8 Bush, 423; Saylor *v.* Daniels, 37 Ill. 331; Bardsley *v.* Delp, 88 Pa. St. 420; Stedman *v.* Carstairs, 97 Pa. St. 234; Green *v.* Kennedy, 6 Mo. App. 577; Grocers' Bank *v.* Penfield, 69 N. Y. 502; Farmers' Bank *v.* Willis, 7 W. Va. 31; Citizens' Bank *v.* Payne, 18 La. Ann. 222; Carlisle *v.* Wishart, 11 Ohio, 172.

[1] Daniel's Negot. Inst., § 831*c*.

[2] Williams *v.* Smith, 2 Hill, 301; Bank of New York *v.* Vanderhorst, 32 N. Y. 553.

antecedent debt;[1] (3) where he received the note in payment of a previous note which was surrendered and cancelled:[2] (4) where he received the note as absolute payment of a pre-existing debt and not merely as security;[3] (5) where he received the note with a valid agreement for extension of time, or with an agreement not to sue upon a pre-existing debt;[4] (6) where he received the note, paying part cash, and applying the residue in payment of a pre-existing debt;[5] (7) where he received the note in part payment of the pre-existing debt, surrendering old notes and taking new notes for balance;[6] (8) where he received the note and discontinued proceedings upon an execution.[7]

"And the transferee has been held not entitled to protection as a purchaser for value: (1) Where the note transferred was hypothecated as security for a pre-existing debt;[8] (2) where the note was transferred as collateral security, and there was an agreement for forbearance and the surrender of a collateral note previously held;[9] (3) where

[1] Bank of Salina *v.* Babcock, 21 Wend. 499; Park Bank *v.* Watson, 42 N. Y. 490; Phœnix Ins. Co. *v.* Church, 81 N. Y. 222; Goodwin *v.* Conklin, 85 N. Y. 21; Ayrault *v.* McQueen, 32 Barb. 305.

[2] Pratt *v.* Coman, 37 N. Y. 440; Brown *v.* Leavitt, 31 N. Y. 113. Clothier *v.* Adriance, 51 N. Y. 326; Youngs *v.* Lee, 12 N. Y. — ; Paddon *v.* Taylor, 44 N. Y. 371; Day *v.* Saunders, 1 Abb. App. 495.

[3] Bank of Sandusky *v.* Scoville, 24 Wend. 115; Bank of St. Albans *v.* Gilliland, 23 Wend. 311; Phœnix Ins. Co. *v.* Church, 81 N. Y. 226; Gould *v.* Segee, 5 Duer, 260; Mayer *v.* Mode, 14 Hun (21 N. Y. S. C.), 155; New York Marbled Iron Works *v.* Smith, 4 Duer, 377; White *v.* Springfield Band, 3 Sand. 7.

[4] Merchants & Farmers' Bank *v.* Wexson, 42 N. Y. 438; Grocers' Bank *v.* Penfield, 14 N. Y. S. C. (7 Hun), 279.

[5] Mechanics' & Traders' Bank *v.* Crow, 60 N. Y. 85.

[6] Chrysler *v.* Renois, 43 N. Y. 209.

[7] Boyd *v.* Cumming, 17 N. Y. 101.

[8] Statker *v.* McDonald, 6 Hill, 93. See also Webster *v* Van Steenburgh, 46 Barb. 312; Chesbrough *v.* Wright, 41 Barb. 28; Ontario Bank *v.* Worthington, 12 Wend. 600.

[9] Francis *v.* Joseph, 3 Edw. Ch. 182.

the note was transferred on account of a precedent debt (and a dishonest check surrendered), with no indication that it was taken in absolute payment beyond that of a receipt for it in payment;[1] (4) where a time draft was fraudulently diverted in payment of a past due debt;[2] (5) where the note was indorsed by the debtor of a call loan, with agreement for a little delay, but with no definite extension of time;[3] (6) and where the note was taken in conditional payment, and suit on pre-existing debt dismissed."[4]

§ 170. **Consideration being debt of another.** — Where the debt of another is intended to be paid or extinguished by the issue of a commercial paper, the debt would constitute a sufficient consideration. When this occurs, it becomes a complete novation, the extinguishment of the existing debt being the consideration for the new promise.[5]

[1] Phœnix Ins. Co., *v.* Church, 81 N. Y. 218; Potts *v.* Mayer, 74 N. Y. 594. In Payne *v.* Cutter, 13 Wend. 605, the note was charged up in an account as payment, but the transferee was held not to be a holder for value. In Bahrman *v.* Bayles, 14 Hun (21 N. Y. S. C.), 608, the note was taken in payment of a pre-existing debt, but the transferee was held not a *bona fide* holder for value, partly upon the ground, as it would seem, that he was chargeable with notice of circumstances affecting its validity. In Schepp *v.* Carpenter, 51 N. Y. 602, Johnson, Commissioner, said: "The existence of the debt from Church to the plaintiff was a sufficient consideration between them to sustain a promise to pay it or a transfer of property to secure its payment, and according to the doctrine which has prevailed in this State for many years, to sustain the transfer of a note made for the debtor's accommodation and general benefit. When, however, an accommodation note has been made for a specific purpose, and has been diverted to some other purpose, the rule is different, and the party asserting a title to it must show himself to be a *bona fide* holder."

[2] Moore *v.* Ryder, 65 N. Y. 438.

[3] Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235.

[4] Wardell *v.* Howell, 9 Wend. 173.

[5] Myers *v.* Van Wagoner, 56 Mo. 115; Sherwood *v.* Archer, 10 Hun, 73; Outhwite *v.* Porter, 13 Mich. 533; Carpenter *v.* Murphree, 49 Ala. 84; Horn *v.* Fuller, 6 N. H. 512; South Boston Iron Co. *v.* Brown, 63 Me. 139; Railroad *v.* Chamberlain, 44 N. H. 497; Gillett *v.* Ballou, 29 Vt. 296; Leonard *v.* Duffin, 94 Pa. St. 218; Maine Mut. Ins. Co. *v.* Blunt, 64 Me. 95; Sey-

And the original debtor, having been discharged from liability by the issue of a commercial instrument by a third person, may in like manner bind himself on a new note, issued for the purpose of extinguishing the obligation of this third person.[1] So, too, will the joint debt of the maker and a third person be a sufficient consideration for the separate note of the maker.[2] So, also, is a note binding upon the maker, which is given for the release of his brother's land from an attachment,[3] and a note by a parent in payment of the son's defalcation.[4]

But the old debt must be a legal obligation, in order that its extinguishment may constitute a sufficient consideration.[5] Forbearance to bring suit on the debt or other liability of one person is always a good consideration for the commercial paper of another.[6] It is likewise a sufficient consideration for the indorsement of a surety;[7] or of a guarantor,[8] and for an acceptance of a bill drawn for the

mour *v.* Prescott, 69 Me. 376; Lines *v.* Smith, 4 Fla. 49; Crofts *v.* Beal, 11 C. B. 272; Nickerson *v.* Hayward, 19 Johns. 113. A note given in settlement of a civil suit for damages against the maker's brother, is founded upon sufficient consideration. Smith *v.* Richards, 29 Conn. 232. The fact that the note given in settlement of the debt of another is less in amount than the debt, does not affect the holder's title. Harrod *v.* Black 1 Duv. 180.

[1] Compton *v.* Blair, 27 Mich. 397.

[2] Heywood *v.* Watson, 4 Bing. 496; *s. c.* 1 M. & P. 268.

[3] Bradbury *v.* Blake, 25 Me. 397;

[4] Popple *v.* Day, 123 Mass. 520.

[5] Bullock *v.* Ogburn, 13 Ala. 346. But see Leonard *v.* Duffin, 94 Pa. St. 218, in which the moral obligation of a married woman was held to be a sufficient consideration for the note of another.

[6] Silvis *v.* Ely, 3 Watts & S. 420; M. & F. Bank of Albany *v.* Wixson, 42 N. Y. 438; Abbott *v.* Fisher, 124 Mass. 414; Randolph *v.* Peck, 1 Hun, 125.

[7] Bell *v.* Simpson, 75 Mo. 485; Jennison *v.* Stafford, 1 Cush. 168; Rood *v.* Jones, 1 Dougl. (Mich.) 188; Hockenbury *v.* Meyers, 5 Vroom, 347; Chaddock *v.* Vanness, 6 Vroom, 518; Hall *v.* Clopton, 56 Miss. 555.

[8] Worcester Bank *v.* Hill, 113 Mass. 25; Howard *v.* Jones, 13 Mo. App. 596

accommodation of the drawer.[1] And where a commercial instrument, given in settlement of an existing debt, is payable in the future, it is held that forbearance is implied.[2] But if there is no extinguishment of the existing debt, and no forbearance or any other new consideration, such as the surrender of collateral security,[3] the note or bill given for another's debt is held to be without consideration.[4]

But it would seem that if the fact of the creditor being lulled into security by the transfer to him of collateral security is to be considered a sufficient consideration for the transfer of the security,[5] the same conclusion is tenable in this connection. A debt is in both cases to be secured, and there is no difference, in the matter of consideration, between the indorsement and the execution of a commercial instrument. If different conclusions in the two cases are to be justified, it cannot be done except on the ground that for commercial convenience the pledgee of commercial paper is held to be a holder for value, notwithstanding there is no consideration present, of the kind required for the support of the paper as between the original parties.[6]

[1] Walker *v.* Sherman, 11 Met. 170; Pierce *v.* Kittredge, 115 Mass. 374.

[2] Thompson *v.* Gray, 63 Me. 226; York *v.* Pearson, 63 Me. 587; Popplewell *v.* Wilson, 1 Stra. 264; Ridout *v.* Briston, 1 Cromp. & J. 231; *s. c.* 1 Tyrw. 84; Andrews *v.* Marrett, 58 Me. 539; Munson *v.* Adams, 89 Ill. 450; Garnet *v.* Clarke, 11 Mod. 226; Baker *v.* Walker, 14 M. & W. 465; Wilders *v.* Stevens, 15 M. & W. 208; Sowerby *v.* Butcher, 2 C. & M. 372; *s. c.* 4 Tyrw. 320; Combs. *v.* Ingram, 4 D. &. R. 211.

[3] Rust *v.* Hauselt, 14 Jones & S. 22; Wright *v.* Hughes, 13 Ind. 109; Brandbury *v.* Blake, 25 Me. 397.

[4] Bingham *v.* Kimball, 17 Ind. 396; Mansfield *v.* Corbin, 2 Cush 151; Potter *v.* Earnest, 45 Ind. 416; Cook *v.* Bradley, 7 Conn. 57; McElven *v.* Sloan, 56 Ga. 208; Murphy *v.* Keyes, 7 Jones & S. 78. And mere crediting the account of the debt with the amount of the paper has been held to be insufficient. Stoudenmire *v.* Ware, 48 Ala. 589.

[5] See *ante*, § 168.

[6] In Currie *v.* Misa, L. R. 10 Exch. 153, Lord Coleridge, Ch. J., says: "It is too late to dispute that a pre-existing debt due to the transferee

It is sometimes thought, or at least felt, that close relationship between the debtor and the maker of the commercial instrument does away with the necessity of a consideration; as, for example, where a father issues his note or bill in payment of his son's debts, or a son promises to pay his father's debts. In all such cases, if there is no specific consideration supporting the promise, such as the extinguishment of the debt, or the forbearance to sue, the commercial instrument is not binding, notwithstanding this close relationship.[1] But where there is a distinct consideration, as where a defalcation by the son is settled by the father's note, or the original note or bill is surrendered and canceled on receipt of the new note, the new paper is binding.[2] For the same reasons, a widow is not bound by her note, given to satisfy the bill of the physician who attended her husband in his last illness, or to liquidate any other indebtedness of her husband, if she does not receive any property from her husband's estate.[3] And naturally, and for stronger reasons, the wife's note, given for the debt of her husband, without consideration, does not bind her.[4]

of a bill entitles him to all the rights of a holder for value. But it seem equally clear that this is an exception to general rules, an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favor the unrestricted use as currency of negotiable instruments."

[1] Mansfield *v.* Corbin, 2 Cush. 151; Potter *v.* Earnest, 45 Ind. 416; Cook *v.* Bradley, 7 Conn. 57; McElven *v.* Sloan, 56 Ga. 208; Murphy *v.* Keyes, 7 Jones & S. 18.

[2] Popple *v.* Day, 123 Mass. 520; Seymour *v.* Prescott, 69 Me. 376; Myers *v.* Van Wagoner, 56 Mo. 115. And even the surrender of the note made by a father has been held to be insufficient as a consideration for the son's note. Rowland *v.* Harris, 55 Ga. 141.

[3] Williams *v.* Nichols, 10 Gray, 83; Hetherington *v.* Hixon, 46 Ala. 297.

[4] Alger *v.* Scott, 54 N. Y. 14; Williams *v.* Walker, 18 S. C. 577. And in those States in which the common-law disability of coverture still exists, a note of a widow, given after her husband's death for a joint note of both, would be without consideration, and is not binding upon

But where the widow receives assets from her husband's estate, she will be bound by her obligations, issued in payment of his debts, at least to the amount of the assets she received.[1] In like manner, will the executor, the administrator, and the guardian, not be liable on their promises to pay claims against the estates they have in charge, unless in consequence of their promises the estate is relieved from liability or there is a forbearance to sue the estate.[2] But if these representatives have in possession assets of the estates, they will then be liable on their notes, at least to the amount of the assets in their possession.[3]

It has been held that the administrator's note is not affected by the fact that the debt of the deceased, for which it was given, is barred by the statute of limitations.[4] On the other hand, it was decided that the moral obligation, arising out of a barred debt of the ancestor, was not a sufficient consideration for the note of the heir.[5]

It is also necessary to make the paper binding, for the payee to be connected with the consideration, *i.e.*, since in

her unless she had a separate estate, on which it could be charged. Coward *v.* Hughes, 1 K. & J. 443.

[1] Mull *v.* Van Trees, 50 Cal. 547. But see Maull *v.* Vaughn, 45 Ala. 134, where her possession of assets, before the administration upon the husband's estate, was held to be insufficient to support her note for his debts.

[2] In respect to executors and administrators, see Thompson *v.* Maughn, 3 Iowa, 442; Ten Eyck *v.* Vanderpoel, 8 Johns. 120; Schoomaker *v.* Roosa, 17 Johns. 301; Bank of Troy *v.* Topping, 9 Wend 273; Rucker *v.* Wadlington, 5 J. J. Marsh. 238. An agreement to forbearance has been implied from the promise to pay interest on debt of the deceased (Childs *v.* Monin, 2 Brod. *v.* Bing. 460), and from the act of substituting the administrator's note for that of the intestate. Harrison *v.* McClellan, § 57 Ga. 531. In respect to guardians, see Thatcher *v.* Dinsmore, Wren *v.* Hoffman, 41 Miss. 616; Coleman *v.* Davies, 45 Ga. 489.

[3] Byrd *v.* Holloway, 6 Sm. & M. 199; Rittenhouse *v.* Amerman, 64 Mo. 197; McGrath *v.* Barnes, 13 S. C. 323; Stevenson *v.* Edwards, 27 La Ann. 302.

[4] Wheaton *v.* Wilmarth, 13 Met. 422.

[5] Didlake *v.* Robb. 1 Woods C. C. 680.

such cases there is no benefit to the promisor, there must be a detriment to the promisee. The debt of a deceased person, leaving no heir or representative, cannot be the consideration of a note of a third person.[1] And a debt due to a deceased person or to a minor, will not constitute a sufficient consideration for a note to the administrator of the deceased's administrator or of the minor's guardian.[2] And so, likewise, a due bill to the husband is not a legal consideration for a note to the widow.[3] But it has been held that a note given, in satisfaction of a debt due to a deceased person, to one who expects to be and is subsequently appointed administrator, with the understanding that the payee will, after his appointment, give the maker a receipt for the debt due to the deceased, is supported by a competent consideration, notwithstanding the payee and prospective administrator fails to execute his promise.[4]

§ 171. **Valuable consideration other than money.** — There are other sufficient considerations, besides money; but in order that a consideration may be sufficient to make the payee or indorsee of commercial paper a holder for value, it must have, if not a monetary, at least a substantial value. In the succeeding sections, the more common kinds of valuable consideration of this class will be enumerated and explained.

§ 172. **Transfer of property — Contingent and equitable interests.** — It needs only to be stated that the purchase of all kinds of property, both real and personal, will form a sufficient consideration for a note or other com-

[1] Nelson *v.* Serle, 4 M. & W. 795, reversing Serle *v.* Waterworth, 4 M. & W. 9; *s. c.* 6 Dowl. 684.

[2] Towles *v.* Towles, 21 Vt. 181.

[3] Bryan *v.* Philpot, 3 Ired. 467.

[4] Nelson *v.* Lovejoy, 14 Ala. 568.

mercial obligation,[1] even when the right of property purchased is contingent or equitable in character. Thus, the sale of land, subject to a mortgage, is a sufficient consideration, although the right sold is only an *equity of redemption*.[2] So, also, where the title presently acquired is only executory, the understanding being that the absolute title is to pass when the last installment of the purchase money is paid.[3] And so, likewise, in respect to any other equitable title.[4] The transfer of incorporeal rights will be as good a consideration for commercial paper as the transfer of corporeal property. Thus, the good will of the business,[5] the rights of corporate membership,[6] a franchise and other incorporeal hereditaments,[7] and a policy of life insurance,[8] have been frequently held to be sufficient considerations.

Even when the right is defeasible in character, its transfer will constitute a sufficient consideration. Thus the purchase of a franchise, which had been granted by a municipal corporation *ultra vires*,[9] or of a lease which contains a cov-

[1] Kline *v.* Spahr, 56 Ind. 296; Holmes *v.* Ebersole, 12 Ind. 392. Not only when the paper is given in payment, but also as collateral. Fenby *v.* Pritchard, 2 Sandf. 151.

[2] Hoyt *v.* Bradley, 27 Me. 242; Fitzgerald *v.* Barber, 13 Mo. App. 192.

[3] McMath *v.* Johnson, 41 Miss. 439.

[4] Ervin *v.* Morris, 26 Kan. 664. In Washband *v.* Washband, 24 Conn. 500, the note was given for transfer to the maker of improvements which had been erected on another's land, with the permission of the owner.

[5] Searing *v.* Lye, 4 E. D. Smith, 197; Smock *v.* Pierson, 68 Ind. 405.

[6] Thus, a note is founded upon a sufficient consideration, which is given for fees due by a member to the incorporated society. Middlesex *v.* Davis, 3 Met. 133; Goree *v.* Wilson, 1 Bailey, 597. But not for fees due to an incorporated society (Nightingale *v.* Barney, 4 G. Greene, 106); nor, it seems, for dues to a benevolent association. Nash *v.* Russell, 5 Barb. 556.

[7] Carpentier *v.* Minturn, 6 Lans. 56; Long *v.* Hopkins, 50 Me. 318; Swanzer *v.* Mayberry, 59 Cal. 91.

[8] Insurance *v.* Cardwell, 65 Ind. 138.

[9] Carpentier *v.* Minturn, 6 Lans. 56.

enant against assignment,[1] and other like cases of conditional rights,[2] have been held to be sufficient considerations, since an actually existing right passed, notwithstanding it was defeasible. But where no right existed, which could be passed, as where the transfer of the right, or the right itself, was absolutely void, there was no consideration for the commercial paper given in satisfaction of the attempted transfer.[3] It is, however, held that a quit-claim deed is a sufficient consideration for a note, although the grantor has no title to convey, if the transaction is conducted and completed in good faith.[4]

§ 172a. **Transfer of commercial paper.** — Commercial paper being a species of property, its transfer or delivery will be sufficient consideration for some other commercial instrument not only when there is an outright sale of the paper, such as occurs daily on the stock markets of the world; but also by the comparatively common transaction among business men, of lending their financial credit to each other by an exchange of their paper, A. giving to B. his note, or bill, or check, in consideration of a like obligation from B.[5] In the same manner, the surrender of one com-

[1] Spear *v.* Fuller, 8 N. H. 174.

[2] Hodsdon *v.* Smith, 14 N. H. 41.

[3] The transfer of a married woman's property, Fowler *v.* Shearer, 7 Mass. 14; the sale of Indian lands to any but Indians, Vickroy *v.* Pratt, 7 Kan. 238; Jarvis *v.* Campbell, 23 Kan. 370; the transfer of a liquor license which is not transferable, Strahn *v.* Hamilton, 38 Ind. 57. Where the right did not exist at all, Long *v.* Hopkins, 50 Me. 318; Swanzer *v.* Mayberry, 59 Cal. 91. Mere possession under a void conveyance will not be a sufficient consideration. Sorrells *v.* McHenry, 38 Ark. 127.

[4] Bonney *v.* Smith, 17 Ill. 531; Bachelder *v.* Lovely, 69 Me. 33.

[5] Crowley *v.* Dunlop, 1 T. R. 565; Eaton *v.* Carey, 10 Pick. 211; Buckler *v.* Buttivant, 3 East, 92; Rose *v.* Sims, 1 B. & Ad. 521; Higginson *v.* Gray, 6 Met. 212; Rankin *v.* Knight, 1 Cincin. 515; Duncan *v.* Gilbert, 5 Dutch. 521; Mickles *v.* Colvin, 4 Barb. 304; Byrne *v.* Schwing, 6 B. Mon. 199; Williams *v.* Banks, 11 Md. 198; Wooster *v.* Jenkins, 3 Denio, 187; Whittier *v.* Eager, 1 Allen, 499; Backus *v.* Spaulding, 116 Mass. 418;

mercial obligation is a valid consideration for a second obligation from the same maker; — an occurrence which is called a renewal of commercial paper, when the substituted paper is of the same kind as the original obligation.[1]

As a general proposition, in an exchange of commercial paper, each instrument constitutes an independent contract; one maker is not merely a surety for the other. The one instrument is the consideration for the other, and neither can be called accommodation paper.[2] Nor does it affect the validity of either, if one of them is not paid, in consequence of the subsequent insolvency of the maker; at least, when the other instrument has already passed into the hands of a holder for value.[3] But as long as both instruments remain in the hands of the original parties, the instrument remaining unpaid may be set up as a counterclaim in an action on the other instrument, if both causes of action have accrued.[4] And where the payment of one is made by express condition to depend upon the execution

Leonard *v.* Robbins, 13 Allen, 217; White *v.* Springfield Bank, 3 Sandf. 222; First Nat. Bank *v.* Tisdale, 84 N. Y. 655; Nickerson *v.* Ruger, 84 N. Y. 675; Newman *v.* Frost, 52 N. Y. 422; Cobb *v.* Tituo, 10 N. Y. 198; Bassett *v.* Bassett, 55 Barb. 505; Savage *v.* Ball, 2 C. E. Green, 142; Rolfe *v.* Caslon, 2 H. Bl. 571; Kent *v.* Lowen, 1 Campb. 179; Spooner *v.* Gardiner, R. & M. 84, Hornblower *v.* Proud, 2 B. & Ald. 437; Adams *v.* Soule, 33 Vt. 538; Luke *v.* Fisher, 10 Cush. 271.

[1] First Nat. Bank *v.* Tisdale, 84 N. Y. 655; Baldwin *v.* Van Deusen, 37 N. Y. 487; Bacon *v.* Holloway, 2 E. D. Smith, 159; Greenwood *v.* Lowe, 7 La. Ann. 197. But in all such cases, the surrender of the old instrument will not be a valid consideration for the new, unless the old was itself founded upon a sufficient consideration. See Mason *v.* Jordan, 13 R. I. 193.

[2] Dockray *v.* Dunn, 37 Me, 442; Stickney *v.* Mohler, 19 Md. 506; *In re* London, etc., Bank, L. R. 9 Ch. App. 686.

[3] Forward *v.* Harris, 30 Barb. 338; Holbert *v.* Allen, 4 Fla. 87; *In re* London, etc., Bank, L. R. 9 Ch. App. 686. In the last case, the holder was the assignee in bankruptcy.

[4] Backus *v.* Spaulding, 116 Mass. 418. See Shannon *v.* Langhorn, 9 La. Ann. 526.

or payment of the other, as where a note is given as collateral to secure an acceptance by the payee, the note is without consideration until the acceptance has been given or honored.[1]

§ 173. **Contract for services.** — Agreements to render certain services, or the actual performance of them, will ordinarily be a sufficient consideration for a commercial instrument, the rendition of the service being a benefit to the promisor, and a detriment to the promisee. The character of these services is as varied as are the nature and demands of man. It seems that the performance of any service, which has a real value, will be a sufficient consideration.[2] Services rendered in procuring a pardon for a convicted criminal would be a sufficient consideration.[3] So, also, would be a promise to marry on the part of the man or the woman;[4] a promise to name a child after the maker of the instrument;[5] an agreement to submit a dispute to arbitration and to abide by the award;[6] a promise to support the maker

[1] Carson *v.* Hill, 1 McMull. 76; Hall *v.* Henderson, 84 Ill. 611.

[2] Waterhouse *v.* Kendall, 11 Cush. 128; Cowell *v.* Cornell, 75 N. Y. 91; Walker *v.* Walker, 29 N. Y. 375; Austell *v.* Rice, 5 Ga. 472; Legal instruction, Knowles *v.* Parker, 7 Met. 30; Easton *v.* Easton, 112 Mass. 438; the location or construction of a railroad, along a certain line, First Nat. Bank *v.* Hendrie, 49 Iowa, 402; Rose *v.* San Antonio R. R. Co., 31 Tex. 49; Wright *v.* Irwin, 35 Mich. 347; the location of a public school, Weisner *v.* McBride, 49 Iowa, 220; the emancipation of a slave, Thompson *v.* Thompson, 4 B. Mon. 502; the communication of valuable information, Chandler *v.* Mason, 2 Vt. 193; Lucas *v.* Pico, 55 Cal. 126; the resignation of an office, Peck *v.* Requa, 13 Gray, 407; the sales of goods by a factor or commission, Eastman *v.* Brown, 32 Ill. 53; Burrill *v.* Parsons, 71 Me. 282; Barcus *v.* Elliott, 95 Ind. 661.

[3] Meadow *v.* Bird, 22 Ga. 246; Thompson *v.* Wharton, 7 Bush, 563; McGill *v.* Burnet, 7 J. J. Marsh. 640. See Norman *v.* Cole, 3 Esp. 253.

[4] Banfield *v.* Rumsey, 2 Hun, 112; Wright *v.* Wright, 54 N. Y. 437; Verplank *v.* Sterry, 12 Johns. 536.

[5] Wolford *v.* Powers, 85 Ind. 294.

[6] Rumsey *v.* Leek, 5 Wend. 20. In this case the note was not enforced,

or his wife: [1] and, so, likewise, has a note been held to be supported by a sufficient consideration, which was given by an employer to the employee, payable at the death of the former, in consideration of a moral obligation for services rendered.[2]

In all such cases, the services were more or less valuable to the promisor, and the performance of them constituted a detriment to the promisee. But it is difficult to see how the promise to abstain from the use of intoxicating liquor, or from indulgence in any vice, can be a sufficient consideration for a commercial instrument. There is in the transaction nothing but benefit to the promisee. The promisor gets no benefit, except the spiritual satisfaction of having done good to his neighbor, which is no consideration in law; and the promisee suffers no detriment, unless the ungratified cravings of his nature be called a detriment. But it has been held that such a promise is a sufficient consideration.[3]

On the other hand, it is difficult to see, why the promise of a lot owner to build a hotel on the lot is not a sufficient consideration for a note given by an inhabitant of the town.[4] But whatever the service may be, it cannot be a consideration for an instrument executed after the rendition of the services, and not in pursuance of any contemporaneous agreement for compensation. Services gratuitously rendered, will never support a subsequent promise to pay for them.[5]

because the promise to submit to arbitration was made by a married woman, and hence not binding upon her.

[1] Day *v.* Cutler, 22 Conn. 625. But see Cross *v.* Brown, 51 N. H. 486, where it was held that a promise to support was not a valid consideration for an indorsement as against the other creditors of the indorser.

[2] Barthe *v.* Succession of LaCroix, 29 La. Ann. 326.

[3] Lindell *v.* Ropes, 60 Mo. 249.

[4] Hogan *v* Crawford, 31 Tex. 633.

[5] Roberts *v.* Frisbie, 38 Tex. 219; Hulse *v.* Hulse, 17 C. B. 711; White

It has also been held that an executory contract, the performance of which has been postponed to the future, is a conditional consideration, and therefore insufficient.[1] But this rule cannot be accepted, if at all, without serious qualifications.

§ 174. **Release of legal liabilities — Compromises.** — Another common consideration is the release of legal liabilities of all sorts: the liability for torts, such as assault and battery;[2] for breaches of warranty;[3] the liability to criminal proceedings for the offense of bastardy, and the support of the bastard child.[4] A note given to satisfy claims under the bastardy laws is not affected by the subsequent death of the child, unless the note was given merely for the support of the child;[5] nor would there be any failure of consideration, if the town should afterwards require bonds of the father for the support of the child.[6]

A note was held to be invalid which was given for the tort of a third person,[7] if there was no other consideration; although it would seem that the release to the third person of his liability, being a detriment to the promisee, would

v. Heylman, 34 Pa. St. 142. But the promise to pay for the services may be implied from the relation of the parties. Miller *v.* Mackenzie, 95 N. Y. 575.

[1] Drury *v.* Macaulay, 16 M. & W. 146.

[2] Walbridge *v.* Arnold, 21 Conn. 425; Whitenack *v.* Ten Eyck, 2 Green Ch. 249.

[3] Lyons *v.* Stephens, 45 Ga. 141; Byington *v.* Simpson, 134 Mass. 145.

[4] Hays *v.* McFarlan, 32 Ga. 699; Jackson *v.* Finney, 33 Ga. 512; Taylor *v.* Dansby, 42 Mich. 82; Haven *v.* Hobbs, 1 Vt. 238; Robinson *v.* Crenshaw, 2 Stew. & P. 176; Merritt *v.* Fleming, 42 Ala. 234; Burgen *v.* Strangham, 7 J. J. Marsh. 583; Bunn *v.* Winthrop, 1 Johns. 329; Hawk *v.* Pratt, 78 N. Y. 371; Hicks *v.* Gregory, 8 C. B. 378; Jennings *v.* Brown, 9 M. & W. 496; Hook *v.* Haskin, 14 Hun, 398.

[5] Maxwell *v.* Campbell, 8 Ohio St. 265; Merritt *v.* Fleming, 42 Ala. 234; Harter *v.* Johnson, 16 Ind. 271; Eaton *v.* Burns, 31 Ind. 390.

[6] Knight *v.* Priest, 2 Vt. 507; Maxwell *v.* Campbell, 8 Ohio St. 265.

[7] Conmey *v.* McFarlane, 97 Pa. St. 361.

be a sufficient consideration. On the other hand, it has been held that the discontinuance of bastardy proceedings would be a sufficient consideration for a note to the father of the girl.[1]

But the liability must be a legal one, in order that its release may constitute a sufficient consideration. Since seduction, except under a promise of marriage, does not create any legal liability, at least independently of statute, a note given to the girl on account of it is void for the want of a consideration.[2] The release of the liability for breach of the promise to marry is a sufficient consideration.[3] And so also would be the release of legal rights issuing out of contracts of all kinds.[4] For equally good reasons, the discontinuance of legal proceedings is a valid consideration for a commercial instrument.[5]

So, also, where there are disputed claims, and the contending parties, for the purpose of avoiding the burden and annoyance of litigation, agree upon a compromise of their claims, this compromise, involving, as it does, the release of rights that were at least claimed, has been held to be an all-sufficient consideration in a variety of cases.[6]

[1] Cutter *v.* Collins, 12 Cush. 223; but not for a note to a public officer, unless it was given with her consent. Wheelwright *v.* Sylvester, 4 Allen, 59.

[2] Heaps *v.* Durham, 95 Ill. 583.

[3] Prescott *v.* Ward, 10 Allen, 203.

[4] Crans *v.* Hunter, 28 N. Y. 389; Friermood *v.* Rouser, 17 Ind. 461; Lea *v.* Cassen, 61 Ala. 312; Sternbergh *v.* Provoost, 13 Barb. 365; McClees *v.* Burt, 5 Met. 198.

[5] Seaman *v.* Seaman, 12 Wend. 381; Hackett *v.* Pickering, 5 N. H. 19; Boyd *v.* Cummings, 17 N. Y. 101; Waterman *v.* Barratt, 4 Harr. 311; Shepherd *v.* Watrous, 3 Caines, 166. But the withdrawal of a caveat filed to an application for a public road, since the proceedings are of a public character, is not a sufficient consideration. Smith *v.* Applegate, 3 Zab. 352.

[6] Cook *v.* Wright, 30 L. J. Q. B. 321; *s. c.* 1 B. & S. 559; Loughridge *v.* Dorville, 5 B. & Ald. 117; Callisher *v.* Bischoffsheim, L. R. 5 Q. B. 449; Anstell *v.* Rice, 5 Ga. 472; Foster *v* Metts, 55 Miss. 77; Boone *v.* Boone,

And it will not affect the value of the compromise, as a consideration, if the disputed claim turns out to be without any foundation, as long as both the parties acted in good faith in making the compromise.[1] But if one of the parties was not acting in good faith, and was making claims which he knew were unfounded and illegal, the compromise of such a dispute would fail to support a commercial instrument given in its settlement.[2]

§ 175. **Forbearance and extension of time of payment.** Another common kind of consideration for the support of commercial paper, and of obligations issuing out of such paper, is the forbearance and extension of the time of payment.[3] Whether an agreement to forbear for an indefinite period, as "for a reasonable time," is a sufficient consideration, has been differently decided by the courts, although the weight of authority is in favor of its being sufficient.[4]

58 Miss. 822; Stephens *v.* Spiers, 25 Mo. 386; Zane *v.* Zane, 6 Munf. 406; Richardson *v.* Comstock, 21 Ark. 68.

[1] Russell *v.* Clark, 3 Hill, 504; Taylor *v.* Patrick, 1 Bibb, 168; Keefe *v.* Vogel, 36 Iowa, 87. See Northern, etc., Market Co. *v.* Kelly, 113 U. S. (1884) 199, where the disputed question was whether a corporation could give a lease of its property.

[2] Ormsbee *v.* Howe, 34 Vt. 182; Owsley *v.* Philips, 78 Ky. 516; Gunning *v.* Royal, 59 Miss. 45; Dickinson *v.* Lewis, 34 Ala. 638; Briscoe *v.* Kinealy, 8 Mo. App. 26; Sullivan *v.* Collins, 18 Iowa, 228; Tucker *v.* Rouk, 43 Iowa, 80.

[3] National Bank *v.* Place, 86 N. Y. 444; King *v.* Upton, 4 Me. 387; Robinson *v.* Gould, 11 Cush. 55; Baker *v.* Baker, 14 M. & W. 465; Wheeler *v.* Slocumb, 16 Pick. 52; Brainard *v.* Harris, 14 Ohio, 107; Wilcox *v.* Howland, 23 Pick. 167; Gatzmer *v.* Pierce, 13 Phila. 88; Muirhead *v.* Kirkpatrick, 21 Pa. St. 237; Callahan *v.* Bancroft, 28 Hun, 584; Meltzer *v.* Doll, 91 Ill. 365; Atherton *v.* Marcy, 59 Iowa, 650; Foster *v.* Wise, 27 La. Ann. 538; Fuller *v.* Scott, 8 Kan. 25. But see Shealy *v.* Toole, 56 Ga. 210, in which it was held that forbearance is not a sufficient consideration for an agreement to pay an increased rate of interest. See also, in reference to an agreement for compound interest, Glasscock *v.* Glasscock, 66 Mo. 627.

[4] Lonsdale *v.* Brown, 4 Wash. C. C. 148; McCelvy *v.* Noble, 13 Rich.

But in order to be a sufficient consideration, there must be an *agreement* to forbear; mere forbearance, without the obligation to forbear, is not sufficient.[1]

On the other hand, the agreement to forbear must in its turn be supported by an ample consideration; otherwise, it is not binding upon the creditor.[2] What is a sufficient consideration for such an extension of time is not very difficult to answer. It seems that almost any consideration that would be sufficient for any other contract will suffice here. An agreement for an increased rate of interest[3] or the payment of interest in advance,[4] the payment of another debt not yet due,[5] the giving of increased security,[6] have all been considered sufficient to support the agreement to extend the time of payment. And it has been held to be a sufficient consideration for the agreement to forbear suing on the balance of a note, when a part of it was paid after maturity.[7] But this can not be considered a sound opinion.

The agreement of an indorser to continue his liability on the note would be a sufficient consideration for an agreement to forbear.[8]

330. *Contra*, Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235. But see Glasscock *v.* Glasscock, 66 Mo. 627, in which it was held that an indefinite forbearance was insufficient as a consideration for an agreement to pay compound interest.

[1] Manter *v.* Churchill, 127 Mass. 31.

[2] Roberts *v.* Richardson, 39 Iowa, 290; Costello *v.* Wilhelm, 13 Kan. 229; Dilton *v.* Russell, 5 Neb. 484.

[3] Royal *v.* Lindsay, 15 Kans. 591; Kittle *v.* Wilson, 7 Neb. 76.

[4] Lime Rock Bank *v.* Mullett, 34 Me. 547; Maher *v.* Nanfrom, 86 Ill. 513; Stillwell *v.* Aaron, 69 Mo. 539; St. Joseph Ins. Co. *v.* Hauck, 71 Mo. 465. But not the mere payment of interest already due. Stuber *v.* Schack, 83 Ill. 191.

[5] Rigsbee *v.* Bowler, 17 Ind. 167.

[6] Gates *v.* Hamilton, 12 Iowa, 50; Kester *v.* Hulman, 65 Ind. 100.

[7] Turnbull *v.* Brock, 31 Ohio St. 649. But see, *contra*, Pemberton *v.* Hoosier, 1 Kan. 108.

[8] Third Nat. Bank *v.* Blake, 73 N. Y. 260.

§ 176. **Indemnity as a consideration.** — It is the practice at times to give to one's surety, or to an accommodation party, a note promising to pay the sum of money, for which he has become liable, the object being to indemnify the accommodation party against any loss on the acommodation paper. The indemnity is held in such cases to be a sufficient consideration,[1] although it would seem that, independently of any express agreement, the principal was under an implied obligation to indemnify the accommodation party in consideration of his accommodation.[2]

§ 177. **Illegal considerations.** — Considerations which violate the law are of no force, and a contract based upon an illegal consideration cannot be enforced in the courts, for the same and greater reasons than for which it is held that the contract without any consideration at all cannot be the subject of an action. Where the consideration is illegal, the whole contract becomes affected. There is not only the absence of a sufficient and valid consideration, but also an affirmative cause of objection in the diffusive taint of illegality. For this reason

§ 178. **The effect of illegality on bona fide holders,** — is held by the authorities to be different from that of the mere insufficiency of considerations, at least in certain cases. Where the consideration is declared by decisions of the courts or by statutory enactments to be simply void on account of illegality, it does not affect the validity of the contract any more than the mere absence of a consideration would affect it; and the *bona fide* holder of a commercial

[1] Hazeltine *v.* Guild, 11 N. H. 390; Mercer *v.* Lancaster, 5 Pa. St. 160; Howland *v.* Myer, 3 N. Y. 290; Howard *v.* Palmer, 64 Me. 86; Rutledge *v.* Townsend, 38 Ala. 706.

[2] But see, *contra* Bank of Mobile *v.* Hall, 6 Ala. 639; Andrews *v.* McCoy, 8 Ala. 920.

instrument would nevertheless be able to maintain his action upon it.[1] But where the statute, making the consideration illegal, declares a contract founded on such a consideration to be absolutely void, the language of the statute must be given its proper effect, and so the courts have held that the commercial paper founded on such considerations is void even in the hands of *bona fide* holders.[2] It seems also to

[1] Town of Eagle *v.* Kohn, 84 Ill. 292; Grimes *v.* Hillenbrand, 11 N. Y. S. C. (4 Hun) 354; Smith *v.* Columbia State Bank, 9 Neb. 34; (*note for location of county seat*) Thorne *v.* Yentz, 4 Cal. 321; (*compounding crime*) Clark *v.* Ricker, 14 N. H. 44; Gorham *v.* Keyes, 137 Mass. 583; (*in fraud of creditors*) Gordor *v.* Clapp, 113 Mass. 335; Fay *v.* Fay, 121 Mass. 561; Powell *v.* Inman, 7 Jones, 28; Hamilton *v.* Scull, 25 Mo. 165; Fenton *v.* Ham, 35 Mo. 409; *wagers*, Day v. Stuart, 6 Bing. 109; Cuthbert *v.* Haley, 8 T. R. 390; Davison *v.* Franklin, 1 B. & Ad. 142; Greenland *v.* Dyer, 2 M. & Ry. 422; George *v.* Stanley, 4 Taunt. 683; Boulton *v.* Coglan, 1 Bing. N. C. 640; Atwood *v.* Weeden, 12 R. I. 293; *usury*, Jones *v.* Davison, Holt 256; Digrall *v.* Wigley, 11 East, 43; *usurious discount*, Rockwell *v.* Charles, 2 Hill, 499; Holmes *v.* Williams, 10 Paige, 326; *violations of liquor laws*, Paton *v.* Coit, 5 Mich. 505; Doolittle *v.* Lyman, 44 N. H. 608; Cottle *v* Cleaves, 70 Me. 256; Converse *v.* Foster, 32 Vt. 828. In England and Massachusetts, it is now provided by statute, that notes and bills, founded on a consideration declared void by statute, are nevertheless good in the hands of *bona fide* holders. 5 & 6 Wm. IV. ch., 41; 8 & a Vick., ch. 109; Fitch *v.* Jones, 5 El. & Bl. 238; Parsons *v.* Alexander, 5 El. & Bl. 263; Hay *v.* Ayling, 16 Q. B. 423; Goldsmith *v.* Hampton, 5 C. B. (N. S.) 94; Mass. Rev. Stat. 35, § 2; Kendall *v.* Robertson, 12 Cush. 156.

[2] In Vallet *v.* Parker, Savage, C. J., said: "Wherever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the court to be so, for failure of, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration." Glen *v.* Farmers' Bank, 70 N. C. 191; Woods *v.* Armstrong, 54 Ala. 150; Hatch *v.* Burroughs, 1 Woods, 439; Smith *v.* Columbus N. B., 9 Neb. 34; Bacon *v.* Lee, 4 Clark (Iowa), 49; Town of Eagle *v.* Kohn, 84 Ill. 292; Bayley *v.* Taber, 5 Mass. 286; Ramsdell *v.* Morgan, 16 Wend. 574; Aurora *v.* West, 22 Ind. 88; Taylor *v.* Beck, 3 Rand. 316; Weed *v.* Bond, 21 Ga. 195; the statute of Anne on wagers, Robinson *v.* Bland, 2 Burr. 1077; Young *v.* Moore, 1 Willes, 67; McKinwell *v.* Robinson, 3 M. & W. 434; *lottery tickets*, Thompson *v.* Milligan, 2 Cranch C. C. 207; Hawkins *v.* Cox, 2 Cranch C. C. 173; Hunt *v.* Knickerbocker, 5 Johns. 327; *gambling*, Edwards *v.* Dick, 4 B. & Ald. 212; O'Keefe

be a general rule of law, that all contracts, based on a consideration which is prohibited by law under a penalty, are void. This rule has been applied to commercial paper and enforced against an innocent indorsee.[1] Where the statute provided that, for taking usurious interest, treble the amount of interest shall be forfeited by the plaintiff in an action on the paper, it was held that the statute applied to an innocent indorsee, who had taken the paper in due course of trade.[2] Where the illegality of the consideration does not constitute a defense against a *bona fide* holder, the burden of proof will always be on the plaintiff to show that he has taken the paper in good faith and for value.[3]

v. Dunn, 6 Taunt. 315; *stock gambling*, Barnard *v.* Backhaus, 52 Wis. 593; *usury* (statute of Anne), Lowe *v.* Waller, Dougl. 736; Chapman *v.* Black, 2 B. & Ald. 590; Henderson *v.* Benson, 8 Price, 288; Wilkie *v.* Roosevelt, 3 Johns. Cas. 66.

[1] Woods *v.* Armstrong, 54 Ala. 150; Griffiths *v.* Wells, 3 Denio, 226; 1 Parsons, 213.

[2] In Kendal *v.* Robertson, 12 Cush. 156, Shaw, C. J., said: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee; the natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the legislature to extend such partial forfeiture in like manner, and attach it as before to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same, to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequences to the contract itself, whenever set up as a proof of debt." See Wortendyke *v.* Meehan, 9 Neb. 221; Savings Bank *v.* Scott, 10 Neb. 83.

[3] Sistermans *v.* Field, 9 Gray, 331; Paton *v.* Coit, 5 Mich. 505; Wortendyke *v.* Meehan, 9 Neb. 221; Savings Bank *v.* Scott, 10 Neb. 83. See Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 761; Kellogg *v.* Curtis, 69 Me. 212; Duerson *v.* Alsop, 27 Gratt. 249; Sperry *v.* Spaulding, 45 Cal. 544; Sloan *v.* Union Banking Co., 67 Pa. St. 470; McClintick *v.* Cummins, 2 McLean, 98; Johnson *v.* McMurry, 72 Mo. 282; Woodhill *v.* Holmes, 10 Johns. 231; Fitch *v.* Jones, 32 Eng. L. & Eq. 134; Smith *v.* Braine, 3 Eng. L. & Eq. 380; *s. c.* 16 Q. B. 244. See also *post*, § 303.

§ 179. **Partial illegality of consideration.**— As a general proposition, it may be safely said that where part of the consideration is illegal, the entire commercial instrument is void. It is not considered to be consistent with public policy for the courts to undertake the apportionment of the contract between the legal and the illegal consideration, and the avoidance of the whole contract is but a merited penalty for engaging in questionable proceedings.[1] If the instrument of indebtedness is founded upon two or more distinct and severable considerations, one of which is illegal, although there are authorities to the contrary,[2] the better opinion is, that no action can be maintained on the instrument for the recovery of the legal part: but since the parts of the consideration are separate and distinct, the illegality of one part cannot affect the right of action on the legal part, which exists independently of the instrument of indebtedness.[3]

[1] Robinson *v.* Bland, 2 Burr. 1077; Scott *v.* Gilmore, 3 Taunt, 226; Chapman *v.* Black, 2 B. & Ald. 588; Cruikshanks *v.* Rose, 5 C. & P. 19; Owens *v.* Porter, 4 C. & P. 367; Craig *v.* Andrews, 7 Iowa, 17; Taylor *v.* Pickett, 52 Iowa, 467; Quigley *v.* Duffey, 52 Iowa, 610; Perkins *v.* Cummings, 2 Gray, 258; Brigham *v.* Potter, 14 Gray, 522; Hoyt *v.* Macon, 2 Col. 502; Carlton *v.* Woods, 28 N. H. 292; Coburn *v.* Odell, 20 N. H. 540; Barnard *v.* Backhaus, 52 Wis. 593; Gardner *v.* Maxey, 9. B. Mon. 90, Hyndes *v.* Hays, 25 B. Mon. 31; Deering *v.* Chapman, 22 Me. 488; Averbeck *v.* Hall, 14 Bush, 505; Saratoga Bank *v.* King, 44 N. Y. 87; Woodruff *v.* Hinman, 11 Vt. 592; Gamble *v.* Grimes, 2 Ind. 392; Everhart *v.* Packett, 73 Ind. 409; Snyder *v.* Willey, 33 Mich. 483; Wisner *v.* Bardwell, 38 Mich. 278; Wynne *v.* Whisenant, 37 Ala. 46; Covington *v.* Threadgill, 88 N. C. 186; Widoe *v.* Webb, 20 Ohio St. 431; Wilkins *v.* Riley, 47 Miss. 306; Cotten *v.* McKenzie, 57 Miss. 418; Hyslop *v.* Clarke, 14 Johns. 465; Clark *v.* Ricker, 14 N. H. 44; Chandler *v.* Johnson, 39 Ga. 85; Kidder *v.* Blake, 45 N. H. 530.

[2] Clopton *v.* Elkin, 46 Miss. 95. See Guild *v.* Belcher, 119 Mass. 257; McGuinness *v.* Bligh, 11 R. I. 94; Bron *v.* Becnel, 20 La. Ann. 254; *s. c.* 22 La. Ann. 189.

[3] In Widoe *v.* Webb, 21 Ohio St. 431, the action was on a note, given in settlement of an account, of which some of the items were for intoxicating liquors sold in violation of the law. Scott, C. J.: "With respect

It has been held that where the legal part of the consideration exceeds in amount the entire instrument of indebtedness, the illegality of another part of the consideration will not annihilate the instrument.[1] And if there are several, given in the same transaction, or at the same time, and each of them exceeds in amount the illegal consideration, the holder may apply the defense to either of the instruments, as he may elect.[2] It would be difficult to say to which of them the defense should apply, when both had been assigned, so that they are held by different parties. If only one of them had been assigned, it follows, as a consequence of the inequality of equity between the original holder and a subsequent indorsee, and the liability as a guarantor of an indorser, that the original holder should have the defense prevail against him. Whether the indorsee would have the right to compel such a disposition of the defense so that the obligor may be prevented from setting up the defense in the action by the indorsee, depends upon the question, whether the acknowledged right of the original holder to make the election passes by indorsement of

to the items of the plaintiff's account, which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note, which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: "It is but a reasonable punishment for his including with his just due that which he had no right to take." Robinson *v.* Bland, 2 Burr. 1077; Hanover *v.* Doane, 12 Wall. 342; Perkins *v.* Cummings, 2 Gray, 258; Brigham *v.* Potter, 14 Gray, 522; Clark *v.* Ricker, 14 N. H. 44; Carlton *v.* Bailey, 27 N. H. 234; Carlton *v.* Woods, 28 N. H. 290; Hart *v.* Macon, 2 Col. 508.

[1] Warren *v.* Chapman, 105 Mass. 87.

[2] Carradine *v.* Wilson, 61 Miss. 573.

one of the instruments to the indorsee. We see no reason why it should not. But where both instruments have been transferred to *bona fide* purchasers, and the illegality of the consideration avoids the instruments, even in the hands of the innocent indorsee,[1] the equities of the indorsee being equal, it is difficult to say in the absence of adjudication, what would be the ruling principle.

§ 180. **Effect of a renewal on illegal consideration.**— Where the consideration of an instrument is illegal, a renewal of it, or the substitution of a new instrument for the old one, does not cure the defect arising from illegality of consideration. This defense is as good against the renewal or the substituted paper, as it was against the original.[2] But if the illegal part of the consideration is excluded from the renewal, the renewal will then be valid.[3] It has also been held that where a bill is given in renewal of two or more other bills, one of which was founded upon an illegal consideration, the illegality of the consideration of one would not affect the validity of the renewal in respect to the amount of the original bills which are not tainted with this illegality.[4]

But where a contractual liability, based upon an illegal consideration, has been reduced to judgment, on account of the failure of the defendant to set it up in defense, the judgment cannot afterwards be set aside on account of the illegality of the consideration, at least as against a plaintiff, who had no knowledge of its illegality.[5]

[1] See *ante*, § 178.

[2] Chapman *v.* Black, 2 B. & Ald. 588; Preston *v.* Jackson, 2 Stark. 237; Southall *v.* Rigg, 11 C. B. 481; Flight *v.* Reed, 32 L. J. Exch. 265; 1 Hurlst. & C. 703; Wynne *v.* Collander, 1 Russ. 293.

[3] Boulton *v.* Coghlan, 1 Bing. N. C. 640; Hay *v.* Ayling, 20 L. J. Q. B. 171; *s. c.* 16 Q. B. 423.

[4] Doty *v.* Knox Co. Bank, 16 Ohio St. 133.

[5] George *v.* Stanley, 4 Taunt. 683; Davison *v.* Franklin, 1 B. & Ad. 142; Shepherd *v.* Chester, 4 T. R. 275.

§ 181. **Equitable relief to maker on account of illegal consideration.** — When a contract is tainted by being founded upon an illegal consideration, both parties being necessarily *in pari delicto*, the law leaves them severely alone. The courts cannot permit any action upon the contract for any purpose. Not only is it impossible for the obligee of such a contract to sue upon it, but it is also impossible for the obligor to recover, for the purpose of destroying it, the written instrument of indebtedness which may have been delivered to the obligee; or to recover money which the obligor may have paid out on the debt. These rulings have been applied to commercial paper, which had been given to compound a felony.[1]

§ 182. **What are illegal considerations.** — It will be impossible to enumerate all the possible considerations that are illegal. And hence in this connection it will suffice, if the more common kinds of illegal considerations are mentioned, accompanied by whatever explanations the nature of each consideration may require. In the first place illegal considerations may be divided into those which violate some rule of the common law, and those which are prohibited by some statute.

§ 183. **Compounding of crimes and misdemeanors.** — Since the efficient enforcement of the criminal law is highly essential to the public welfare, any commercial instrument given in consideration of dismissing a criminal prosecution is illegal and void. This is called compounding of crimes, and is an offense of the most serious nature. Such an act cannot be a valid consideration for commercial paper.[2] A promise not to institute a prosecution is as

[1] Atwood *v.* Fisk, 101 Mass. 363; Haynes *v.* Rudd, 83 N. Y. 251; Dartmouth *v.* Bennett, 15 Barb. 541.

[2] Edgecombe *v.* Rodd, 5 East, 294; Galton *v.* Taylor, 7 T. R. 475;

illegal a consideration as the dismissal of a prosecution already instituted.[1] And so, also, is an agreement "to use all legal and proper endeavor" to have a prosecution dismissed.[2] Compounding the inferior misdemeanors is illegal as well as compounding felonies.[3]

But where the agreement is to suppress proceedings only criminal in form, and involving no criminal offense, it is not illegal.[4] It has also been held that the promise to discontinue bastardy proceedings, a *quasi* criminal process, is a good legal consideration for a commercial obligation.[5] It is also not illegal to give a note in settlement of any civil action in tort for damages.[6]

Brett *v.* Tomlinson, 16 East, 293; Elworthy *v.* Bird, 2 Sim. & Stu. 372; Clubb *v.* Hutson, 18 C. B. (N. S.) 414; Johnson *v.* Ogillry, 3 P. Wms. 272; Harding *v.* Cooper, 1 Stark. 467; Wallace *v.* Hardacre, 1 Campb. 45; Kirk *v.* Strickwood, 4 B. & Ad. 421; Commonwealth *v.* Pease, 16 Mass. 91; Clark *v.* Pomeroy, 4 Allen, 534; Hinesborough *v.* Sumner, 9 Vt. 23; Hinds *v.* Chamberlain, 6 N. H. 225; Clark *v.* Ricker, 14 N. H. 44; Farrar *v.* Davis, 53 Vt. 597; Murphy *v.* Bottomer, 40 Mo. 67; Sumner *v.* Summers, 54 Mo. 340; Breathwit *v.* Rogers, 32 Ark. 758; Collier *v.* Waugh, 64 Ind. 456; Chandler *v.* Johnson, 39 Ga. 85; Kimbrough *v.* Lane, 11 Bush, 556; Cain *v.* Southern Express, 1 Baxt. 315; Wynne *v.* Whisenant, 37 Ala. 46; Commonwealth *v.* Johnson, 3 Cush. 454; Porter *v.* Havens, 37 Barb. 343; Steuben Co. Bank *v.* Matthewson, 5 Hill, 249; Vincent *v.* Groom, 1 Yerg. 430; Bell *v.* Wood, 1 Bay, 249; Merrill *v.* Carr, 60 N. H. 114; Doyle *v.* Carroll, 28 U. C. C. P. 218; Roll *v.* Raguet, 4 Ohio, 400.

[1] Gardner *v.* Maxey, 9 B. Mon. 90.

[2] Averbeck *v.* Hall, 14 Bush, 505; Rickets *v.* Harvey, 78 Ind. 152; Shenk *v.* Phelps, 6 Bradw. 612.

[3] Jones *v.* Rice, 16 Pick. 440.

[4] Soule *v.* Bonny, 37 Me. 128.

[5] Hook *v.* Pratt, 78 N. Y. 371; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Knight *v.* Priest, 2 Vt. 507; Cutter *v.* Collins, 12 Cush. 233; Hays *v.* McFarlan, 32 Ga. 699; Jackson *v.* Finney, 33 Ga. 512; Merritt *v.* Fleming, 42 Ala. 234; Maxwell *v.* Campbell, 8 Ohio St. 265; Haven *v.* Hobbs, 1 Vt 238; Burger *v.* Strangham, 7 J. J. Marsh. 583; Robinson *v.* Crenshaw, 2 Stew. & P. 176; Hicks *v.* Gregory, 8 C. B. 378; Jennings *v.* Brown, 9 M. & W. 496.

[6] Price *v.* Summers, 2 South. 578. See also Drage *v.* Ibberson, 2 Esp. 643; Coppock *v.* Bower, 4 M. & W. 361; Kneeshaw *v.* Collier, 30

Of the same character as the compounding of crimes, is the prevention of a conviction by the suppression of evidence. Agreements to suppress evidence are illegal, and a commercial instrument, given in consideration of such an agreement is invalid.[1]

It is illegal to agree to dismiss a prosecution for embezzlement or larceny, even when the amount paid or promised is the same as that which had been taken. The private wrong, involved in the act of larceny or embezzlement, is lost sight of in the greater wrong against the public.[2] But where the money is promised to be paid, without any stipulations that the prosecution was to be dismissed, and without any promise of clemency of any kind, the agreement is legal and binding, notwithstanding the prosecution was subsequently dismissed.[3]

§ 184. **Contracts with alien enemies and in aid of rebellion.** — As has been already explained[4] all contracts with alien enemies are void, and it follows, as a matter of course, that any commercial instrument given in liquidation of such a contract would be founded upon an illegal consideration.

U. C. C. P. 265; Walbridge *v.* Arnold, 21 Conn. 425; Whitenack *v.* Ten Eyck, 2 Green Ch. 249; Prescott *v.* Ward, 10 Allen, 203; Lyons *v.* Stephens, 45 Ga. 141; Jones *v.* Rittenhouse, 87 Ind. 348.

[1] Nerot *v.* Wallace, 3 T. R. 17; Fallows *v.* Taylor, 7 T. R. 475; Edgecombe *v.* Rodd, 5 East, 294; Swan *v.* Chandler, 8 B. Mon. 97; Gardner *v.* Maxey, 9 B. Mon. 90; Hoyt *v.* Macon, 2 Col. 502.

[2] Taylor *v.* Jaques, 106 Mass. 291; Hinesborough *v.* Sumner, 9 Vt. 23; Sumner *v.* Summers, 54 Mo. 340; Godwin *v.* Crowell, 56 Ga. 566; Buck *v.* First Nat. Bank, 27 Mich. 292. But see, *contra*, Bibb *v.* Hitchcock, 49 Ala. 468; Crowder *v.* Reed, 80 Ind. 1. It has also been held that a threatened prosecution is a sufficient consideration for the indorsement as surety by a third person. Jaffray *v.* Brown, 74 N. Y. 393.

[3] Von Windisch *v.* Klaus, 46 Conn. 433; Cohoes *v.* Cropsy, 55 N. Y. 685; Armstrong *v.* Southern Express Co., 4 Baxt. 376.

[4] See *ante*, § 66.

For the same reasons, all contracts in aid of a rebellion against the government are illegal, and commercial paper given in settlement of such contracts are void. This rule has been followed in a number of cases, in which aid had in various ways been given to the Confederacy of the Southern States in their operations against the government of the United States. Commercial paper given in consideration of that aid was declared to be void.[1] But the fact that a note was given by a Confederate officer for a horse, apparently for army use, but not avowedly so, does not make the note illegal.[2] And it has also been held to be no objection to the validity of a commercial instrument, that it was given for money borrowed for the equipment of Confederate troops, even though the payee knew this, if the borrower was not restricted by the contract to this use of the money.[3] A note given to a surety of such an illegal contract for money paid by him as surety has been held to be legal;[4] and so, also, a note or bond given for money borrowed to pay such an illegal debt, particularly after the close of the war.[5] But these latter cases can hardly be considered in line with judicial precedent and legal principle. They are certainly not reliable guides in other cases of illegal considerations. The general rule is, that an illegal consideration taints every contract into which it

[1] Hanauer *v.* Doane, 12 Wall. 342; Critcher *v.* Holloway, 64 N. C. 526; Kingsbury *v.* Gooch, 64 N. C. 528; Kingsbury *v.* Fleming, 66 N. C. 524; Martin *v.* McMillan, 63 N. C. 486; Tatum *v.* Kelly, 25 Ark. 209; McMurtry *v.* Ramsey, 25 Ark. 350; Brooker *v.* Robbins, 26 Ark. 660; Chancely *v.* Bailey, 37 Ga. 532; Pickens *v.* Eskridge, 42 Miss. 114; Stewart *v.* Bosley, 19 La. Ann. 439; Wright *v.* Stacey, 19 La. Ann. 449; Heidenreich *v.* Leonard, 21 La. Ann. 628.

[2] Thedford *v.* McClintock, 47 Ala. 647.

[3] Walker *v.* Jeffries, 45 Miss. 160; Gilliam *v.* Brown, 43 Miss. 641; Williams *v.* Williams, 79 N. C. 411; Puryear *v.* McGavock, 9 Heisk. 461; Bank of Tennessee *v.* Cumming, 9 Heisk. 465.

[4] Powell *v.* Smith, 66 N. C. 401.

[5] Poindexter *v.* Davis, 67 N. C. 112; Murphy *v.* Weems, 69 Ga. 687.

enters, it matters not how often the written instrument of indebtedness may be substituted.[1]

§ 185. **Confederate currency.** — In consequence of the currency, issued by the Confederate government, having been brought into circulation by payment of debts contracted by that government, it has been held by some of the courts that all commercial paper, given for a loan of this currency, was founded upon an illegal consideration, and was therefore void.[2] So, also, were notes declared to be void, which had been given for the purchase of lands and personal property, which according to the contract was to have been paid in Confederate currency.[3] But in some of the other courts, a different view has prevailed. Taking into consideration the fact that no other kind of currency was available to the mercantile circles in the Southern States, and the consequent necessity of using the Confederate currency in commercial dealings, they have held that making use of this currency as a medium of exchange, since it was practically compulsory, did not constitute

[1] See *ante*, § 180.

[2] Ford *v.* Ragland, 25 Ark. 612; George *v.* Terry, 26 Ark. 160; King *v.* Carnall, 26 Ark. 36; Scudder *v.* Thomas, 35 Ga. 364; Calfee *v.* Burgess, 3 W. Va. 274; Goodman *v.* McGehee, 31 Tex. 252; Willis *v.* Johnson, 38 Tex. 303; Smith *v.* Smith, 30 Tex. 754; McCartney *v.* Greenway, 30 Tex. 754; Cundiff *v.* Herron, 33 Tex. 622; Potts *v.* Gray, 3 Coldw. 468; Hale *v.* Huston, 44 Ala. 134; Tarleton *v.* Southern Bank, 44 Ala. 229; Askew *v.* Torbert, 49 Ala. 101; Peltz *v.* Long, 40 Mo. 532; Bozeman, *v.* Allen, 48 Ala. 512; Bailey *v.* Miller, 35 Ga. 330; Dittman, *v.* Meyers, 39 Tex. 295; Norton *v.* Pickens, 21 La. Ann. 575; Durbin, *v.* McMichael, 22 La. Ann. 132; Bank of New Orleans *v.* Franton, 22 La. Ann. 462; Huck *v.* Haller, 19 La. Ann. 257; Reeves *v.* Doughty, 19 La. Ann. 164; Pickens. *v.* Preston, 20 La. Ann. 138; Senzeneau *v.* Saloy, 21 La. Ann. 305; Brossat *v.* Sullivan, 21 La. Ann. 565 In Louisiana, by a provision of the constitution, such paper is void in the hands of a *bona fide holder* for value. Const. La. 1868, art. 127; Baldwin *v.* Sewell, 23 La. Ann. 444.

[3] Revis *v.* Blackstone, 30 Tex. 753; Peltz *v.* Long, 40 Mo. 532; Brown *v.* Wilie, 2 W. Va. 502.

giving aid to the rebellion, and therefore notes and other commercial paper, given for loans of Confederate currency, or for a payment of property which were agreed to be paid for in Confederate currency, were not illegal.[1] Where the contract simply calls for the payment of so many "dollars," it is presumed, in absence of proof to the contrary, that the lawful currency of the United States was intended; but it may be shown by parol evidence that Confederate currency was meant.[2] And where a note was payable in "current bankable funds," it was held that the parties intended United States currency.[3]

§ 186. **Bribery.** — All forms of bribery of public officials are of course illegal, and commercial instruments, given for the purpose of influencing any one in the performance of a public duty, are void on account of the illegality of the consideration. This is the case, whether the paper be given to secure a public office by influencing one who has the power to appoint or elect,[4] or to secure some

[1] Rivers *v.* Moss, 6 Bush, 600; Rhodes *v.* Patillo, 6 Bush, 271; Wyatt *v.* Evins, 52 Ala. 285; Simpson *v.* Lauderdale Co., 56 Ala. 64; McNath *v.* Johnson, 41 Miss. 439; Gist *v.* Gaus, 30 Ark. 285, overruling Latham *v.* Clark, 25 Ark. 574; Scott *v.* Davidson, 33 Tex. 807; Bozeman *v.* Rushing, 51 Ala. 529. And so, also, where there had been a renewal of a note given for the loan of Confederate currency. McLaughlin's 6 Exr. *v.* Beard, 5 W. Va. 538; Beard *v.* Livesay, 4 W. Va. 637.

[2] Diltz *v.* Sadler, 37 Tex. 137; Donley *v.* Vindel, 32 Tex. 43.

[3] Taylor *v.* Turley, 33 Md. 500. Since Maryland was a border State, the presumption adopted by the court was reasonable; but the same presumption would not have been tenable farther south, where the only "current bankable funds," with the exception of a little hoarded gold, were of the Confederate currency.

[4] Parsons *v.* Thompson, 1 H. Bl. 322; Laying *v.* Paine, Wills, 571; Balmer *v.* Bate, 2 Brod. & Bing. 673; Harrington *v.* Kloprogge, 2 Brod. & Bing. 678; Blackford *v.* Preston, 8 T. R. 93; Stackpole *v.* Earle, 2 Wills. 133; Richardson *v.* Mellish, 2 Bing. 229; *s. c.* 9 Moore, 435; Ferris *v.* Adams, 23 Vt. 136; Nichols *v.* Mudgett, 32 Vt. 546; Martin *v.* Wade, 37 Cal. 168; King *v.* Pitt, 1 W. Bl. 380; Allen *v.* Hearn, 1 T. R. 56; Lulston

favor of the officer, or to influence him in other ways, to the benefit of the promisor or of a third person, in the discharge of his official duties.[1] It is illegal to promise *extra* compensation to a public officer to induce extra diligence in the performance of his duties.[2] But, although it is illegal to promise to indemnify an officer against damage from his unlawful acts,[3] it is permissible to indemnify an officer against loss where he in good faith does what he thinks he has a right to do, but about which he might be mistaken. Bonds of indemnity of this kind are very common.[4]

§ 187. **Lobbying.** — Although "lobbying," when done in a dignified and unobjectionable manner, unaccom-

v. Norton, 3 Burr. 1235; Webb *v.* Smith, 4 Bing. N. C. 373; Swayze *v.* Hull, 3 Halst. 54; Commissioners of Johnson Co. *v.* Milliken, 7 Blackf. 301. Contracts in relation to the procurement of offices in the service of a private corporation are considered to be on a different basis, and public policy does not require them to be declared illegal. Peck *v.* Requa, 13 Gray, 407. But it has been held that an administrator of another's estate is a public officer in this sense, and a note given for procuring one's appointment as administrator is void, Porter *v.* Jones, 52 Mo. 399. Of the same character are commercial obligations given to induce a public officer to resign and exert his influence in favor of the obligor's appointment to the office, Meacham *v.* Dow, 32 Vt. 721; or to induce one candidate to withdraw in favor of another, Ham *v.* Smith, 87 Pa. St. 63. See also Gray *v.* Hook, 4 N. Y. 449; Martin *v.* Wade, 37 Cal. 168. See Thetford *v.* Hubbard, 22 Vt. 440, where certain offices were held under the Vermont statute to be salable.

[1] Bell *v.* Quin, 2 Sandf. 146; Tool Company *v.* Norris, 2 Wall. 45; Alston *v.* Atlay, 6 Nev. & M. 686; Denny *v.* Lincoln, 5 Mass. 385; Dealin *v.* Brady, 36 N. Y. 531; Goodale *v.* Holdridge, 2 Johns. 193; Wheeler *v.* Bailey, 13 Johns. 366; Bills *v.* Comstock, 12 Met 468; Totteridge *v.* Mackally, Sir Wm. Jones, 341; Rogers *v.* Reeves, 1 T. R. 418; Samuel *v.* Evans, 2 T. R. 569; Watson *v.* Fletcher, 8 B. & C. 25; Ashley *v.* Dillon, 19 Mo. 619.

[2] Hatch *v.* Mann, 15 Wend, 44.

[3] 10 Co. 102; Yelv. 197; Cro. Eliz. 199.

[4] Cro. Jac. 652; 1 Ld. Raym. 279. But an indemnity bond cannot be required by an officer where the performance of the duty is obligatory. Dudley *v.* Butler, 10 N. H. 281.

panied by any form of bribery, is not illegal, yet since there is so much danger of the lobbyist using improper means to influence the legislators, the services of a lobbyist are never held to be a legal consideration for commercial paper.[1]

§ 188. **Wagers.** — At common law, wagers were not necessarily illegal, and those which were held to be legal would be a sufficient consideration for a commercial instrument.[2] If the subject-matter of the wager was harmless and did not in any manner offend public policy, it was legal.[3] But if the wager has reference to the happening or doing of some act which is illegal or against good morals, the wager is void and will not be enforced.[4] In no part of

[1] Marshall *v.* Balt. & O. R. R. Co., 16 How, 314; Triss *v.* Child, 21 Wall. 441; Harris *v.* Roof, 10 Barb. 489; Rose *v.* Truax, 21 Barb. 361; Clippinger *v.* Hepbaugh, 5 Watts & S. 315.

[2] 1 Daniel's Negot. Inst. 196; Randolph Commercial Paper, § 510; Good *v.* Elliott, 3 T. R. 693; Da Costa *v.* Jones, Cowp. 734. See Tiedeman's Police Power, § 99.

[3] Thus it was lawful to bet that A. has purchased a wagon of B., Good *v.* Elliott, 3 T. R. 693; or to bet on a cricket match or on any other lawful race, Walpole *v.* Saunders, 16 E. C. L. R. 276; Crump *v.* Secrest, 9 Tex. 96; McAlester *v.* Haden, 2 Campb. 438. See also, generally, in support of this doctrine, Sherborne *v.* Colebach, 2 Vent. 175; Hussey *v.* Crickell, 3 Campb. 168; Grant *v.* Hamilton, 3 M. L. 100; Cousins *v.* Mantes, 3 Taunt. 515; Johnson *v.* Lousley, 12 C. B. 468; Dalby *v.* India Life Ins. Co., 15 C. B. 365; Hampden *v.* Walsh, L. R. 12 P. D. 192.

[4] Thus wagers are void, which rest upon the result of an illegal game, Brown *v.* Leeson, 2 H. Bl. 43; Hunt *v.* Bell, 7 J. B. Moore, 212; Egerton *v.* Furzman, Ry. & Mo. 213; Squires *v.* Whisken, 3 Campb. 140; which involve the abstinence from marriage, Huntley *v.* Rice, 10 East, 22; which refer to the expected birth of an illegitimate child, Ditchburn *v.* Goldsmith, 4 Campb. 152; to the sex of a person, and the commission of adultery, Da Costa *v.* Jones, Cowp. 729; wagers on the result of public elections, Beeley *v.* Wingfield, 11 East, 46; Rust *v.* Gott, 9 Cow. 169; Denny *v.* Elkins, 4 Cranch C. C. 161; Brush *v.* Keeler, 5 Wend. 250; Pilkinton *v.* Green, 2 B. & P. 151; Lockhart *v.* Hullinger, 2 Bradw. 465; Gordon *v.* Casey, 23 Ill. 70; Guyman *v.* Burlingame, 36 Ill. 20; Gregory *v.* King, 58 Ill. 169; on the result of a war, Lacaussade *v.*

the civilized world are contracts for the insurance of life or property against accidental destruction held to be invalid.

The English doctrine is clearly sustained, as a part of the common law, by the decision of some of the American courts.[1] But, except in the matter of insurance contracts, all wager contracts are declared to be invalid in Maine, Massachusetts, New Hampshire, Vermont and Pennsylvania.[2] In many of the States and in England, the common law is changed by statutes which prohibit all wager contracts.[3] Inasmuch as insurance contracts serve a useful purpose, they are excepted from the operation of these statutes, either expressly, or by judicial construction. But in order that they may be valid contracts, insurance policies must be taken out by some one bearing a lawful interest in the property or life that is insured. A policy taken out by

White, 7 T. R. 535; Allen *v.* Hearne, 1 T. R. 57; or of a criminal prosecution, Evans *v.* Jones, 5 M. & W. 77; and so, likewise, wagers of all kinds which have an injurious effect upon the feelings or interests of a third person, Da Costa *v.* Jones, Cowp. 729; Eastbrook *v.* Scott, 3 Ves. 456; Eltham *v.* Kingsham, 1 B. & Ald. 683; Harvey *v.* Gibbons, 2 Lev. 161; Gilbert *v.* Sykes, 16 East, 150.

[1] Bunn *v.* Rikes, 4 Johns. 426; Campbell *v.* Richardson, 10 Johns. 406; Dewees *v.* Miller, 5 Harr. 347; Trenton Ins. Co. *v.* Johnson, 4 Zabr. 576; Dunman *v.* Strother, 1 Tex. 89; Wheeler *v.* Friend, 22 Tex. 683; Monroe *v.* Smelley, 25 Tex. 586; Grant *v.* Hamilon, 3 McLean, 100 (U. S. C. C.); Smith *v.* Smith, 21 Ill. 244; Richardson *v.* Kelley, 85 Ill. 491; Petillon *v.* Hipple, 90 Ill. 420; Carrier *v.* Brannan, 3 Cal. 328; Johnson *v.* Hall, 6 Cal. 359; Johnson *v.* Russell, 37 Cal. 670.

[2] See Lewis *v.* Littlefield, 15 Me. 233; McDonough *v.* Webster, 68 Me. 530; Gilmore *v.* Woodcock, 69 Me. 118; Babcock *v.* Thompson, 3 Pick. 446; Ball *v.* Gilbert, 12 Met. 399; Sampson *v.* Shaw, 101 Mass. 150; Perkins *v.* Eaton, 3 N. H. 152; Clark *v.* Gibson, 12 N. H. 386; Winchester *v.* Nutter. 52 N. H. 507; Collamer *v.* Day, 2 Vt. 144; Tarlton *v.* Baker, 18 Vt. 9; Phillips *v.* Ives, 1 Rawle, 36; Brua's Appeal, 55 Pa. St. 294.

[3] Such statutes are to be in Vermont, New York, New Jersey, Tennessee, New Hampshire, Virginia, West Virginia, Wisconsin, Missouri, Illinois, Ohio, Iowa, and probably in other States.

one having no such interest, is an illegal wager, and therefore void.[1]

Like every other illegal transaction, the courts will have nothing to do with the subject-matter of a wager contract, unless, as a penalty, the statute provides for an action to compel a return of the money won and paid for a wager contract. A stakeholder can do what he pleases with the stakes, and no action will be entertained against him.[2] The only person who can maintain an action for the stakes or money paid on a bet, is the creditor of the person who paid it, and he only, when his debtor is insolvent.[3]

§ 189. **Option contracts, when illegal.**[4] — For many years, in all parts of the world, a species of commercial gambling has been devised and developed, and which is still increasing in proportions. Large bodies of men in our commercial centers congregate daily in the exchanges for the purpose of betting on the rise and fall in the price of stocks, cotton and produce of all kinds, and lately, also, of real estate. The business is disguised under the name of speculation, but it is in nothing different from the wager on the result of some game of cards. The card player bets that he will win the game. The merchant, dealing in "futures," bets that the price of a commodity will, at a future day, be a certain sum, more or less than the ruling market price. In neither case does the result add anything to the world's wealth; there is only an exchange of the ownership of property without any corresponding benefit to the former owner.

[1] Byles on Bills, 144; Nantes *v.* Thompson, 2 East, 285; Kent *v.* Bird, Cowp. 583; Roebuck *v.* Hamerton, Cowp. 737; Halford *v.* Rymer, 10 B. & C. 724; Morgan *v.* Pebrer, 4 Scott, 230.

[2] Rust *v.* Gott, 9 Cow. 169.

[3] Clark *v.* Gibson, 12 N. H. 386.

[4] See Tiedeman's Police Power, § 99*a*, for a general discussion of these contracts from the standpoint of constitutional law.

But in this class of cases, it is difficult to discover the wrongful element in the prohibited transactions, and in distinguishing them from legitimate trading. The so-called "option contracts" are in form contracts for the sale or purchase of commercial commodities for future delivery, at a certain price, with the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the price ruling on the day of delivery, the difference to be paid to the seller, if the market price is lower than the contract price, and to the purchaser, if the market price is higher. Such a contract has three striking elements: First, it is a contract for future delivery; secondly, the delivery is conditional upon the will of one or both of the parties; and thirdly, the payment of differences in prices, in the event that the right of refusal is exercised by either party. If the common-law offense of *regrating* were still recognized in the criminal law, all contracts for future delivery may be open to serious objection.[1] But that doctrine of the common law is repudiated, and it may now be considered as definitely settled that a contract for future delivery of goods is not for that reason void. If they infringe the law, it must be for some other reason than that the contract stipulates for a future delivery. This is not only true when the vendor has the goods in his possession at the time of sale, but also when he expects to buy them for future delivery. Lord Tenterden claimed that in the latter case the contract was a wager on the future price of the commodity, and for that reason should not be enforced.[2] But the position here

[1] See Tiedeman's Police Power, § 95.

[2] "I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving by assignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot main-

taken has since been repudiated by the English courts, on the ground that it is not a wager, and if a wager, not one which tends to injure the public.[1] The latter opinion is generally followed in the United States, and it may be stated, as the American rule, that *bona fide* contracts for future delivery of goods are not invalid, because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell.[2]

It is also held to be an objectionable feature in such contracts, that the vendee has no expectation of receiving the goods purchased into his actual possession, but intends to resell them before the delivery of the possession to him.[3]

tain an action on such contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences." Lord Tenterden in Bryan *v.* Lewis, Reg. & Moody, 385*c*. See also, Longmer *v.* Smith, 1 B. & C. 1.

[1] "I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in Bryan *v.* Lewis. It excited a good deal of suprise in my mind at the time, and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for a sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties know that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties." Baron Parke in Hibblewhite *v.* McMorine, 5 M. & W. 58. See Mortimer *v.* McCallan, 6 M. & W. 58; Wells *v.* Porter, 3 Scott, 141.

[2] Head *v.* Goodwin, 37 Me. 181; Rumsey *v.* Berry, 65 Me. 570; Lewis *v.* Lyman, 22 Pick. 437; Thrall *v.* Hill, 110 Mass. 328; Heald *v.* Builders' Ins. Co., 111 Mass. 38; Smith *v.* Atkins, 18 Vt. 461; Noyes *v.* Spaulding, 27 Vt. 420; Hull *v.* Hull, 48 Conn. 250; Hauton *v.* Small, 3 Sandf. 230; Currie *v.* White, 45 N. Y. 822; Bigelow *v.* Benedict, 70 N. Y. 202; Bina's Appeal, 55 Pa. St. 294; Brown *v.* Speyer, 20 Gratt. 309; Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Noyes *v.* Jenkins, 55 Ga. 586; Townville *v.* Casey, 1 Murphy, 389; Whitehead *v.* Root, 2 Met. (Ky.) 584; McCarty *v.* Blevins, 13 Tenn. 195; Wilson *v.* Wilson, 37 Mo. 1; Logan *v.* Musick, 81 Ill. 415; Pixley *v.* Boynton, 79 Ill. 351; Pickering *v.* Case, 79 Ill. 329; Lyon *v.* Culbertson, 83 Ill. 33; Corbett *v.* Underwood, 83 Ill. 324; Sanborn *v.* Benedict, 78 Ill. 309; Wolcott *v.* Heath, 78 Ill. 433.

[3] Ashton *v.* Dakin, 4 H. & N. 867; Sawyer, Wallace & Co. *v.* Daggert,

To quote the words of the Kentucky court, "sales for future delivery have long been regarded and held to be indispensable to modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there can not, in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade, and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay the contract price.[1]" Nor is a contract necessarily hurtful to the public welfare, which provides on payment of a valuable consideration that one at a future day shall have the right to buy certain property or sell other property, according as one or the other happens to be advantageous to him. One may have a lawful and beneficial end in view in acquiring such a right of refusal.[2] Mercantile contracts of this character are not infrequent, and they are consistent with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to delivery, and therefore bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver; and the purchaser may, in the same way, guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods, there

14 Bush, 730; Cameron *v.* Durkheim, 55 N. Y. 425. But see, *contra*, Brua's Appeal, 55 Pa. St. 294; Fareira *v.* Gabell, 89 Pa. St. 89; North *v.* Philips, 89 Pa. St. 250.

[1] Sawyer *et al. v.* Taggart, 14 Bush, 730.

[2] Story *v.* Solomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 71 N. Y. 612; Harris *v.* Lumbridge, 83 N. Y. 92; Bigelow *v.* Benedict, 70 N. Y. 202.

is no inherent vice in such a contract.[1] And the consideration for this option may very properly be the difference between the ruling market price and the price specified in the contract. For that would be the damage to the other party resulting from the sale of the option or refusal.[2]

If each of the preceding propositions is correct, then the illegality of option contracts must depend upon the intention of the parties not to deliver the goods bargained for, but merely to pay the difference between the market price and contract price. The cases are unanimous in the opinion that a contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid.[3] If the contracts were in form, as well as in fact, agreements to pay the dif-

[1] Bigelow *v.* Benedict, 70 N. Y. 202. In this case, A., for a valuable consideration, agreed to purchase gold coin of B. at a named price, the coin to be delivered at any time within six months that B. might choose. This case, as a legitimate transaction, is more easily understood than where the option is to buy certain goods or to sell others, but the latter can exist under lawful circumstances, and have a lawful end in view. See Story *v.* Salmon, 71 N. Y. 420.

[2] Story *v.* Solomon, 71 N. Y. 420; Harris *v.* Lumbridge, 83 N. Y. 92, and the cases cited in the next note.

[3] Rumsey *v.* Berry, 65 Me. 574; Wyman *v.* Fiske, 3 Allen, 238; Brigham *v.* Meade, 10 Allen, 246; Barratt *v.* Hyde, 7 Gray, 160; Brown *v.* Phelps, 103 Mass. 303; Hatch *v.* Douglass, 48 Conn. 116; Noyes *v.* Spaulding, 27 Vt. 240; Story *v.* Solomon, 71 N. Y. 420; Bigelow *v.* Benedict, 70 N. Y. 202; Harris *v.* Lumbridge, 83 N. Y. 92; North *v.* Phillips, 89 Pa. St. 250; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson's Exr. *v.* Thomas, 97 Pa. St. 278; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Brown *v.* Speyer, 20 Gratt. 296; Williams *v.* Carr, 80 N. C. 294; Williams *v.* Tiedemann, 6 Mo. App. 269; Lyon *v.* Culbertson, 83 Ill. 33; Cole *v.* Milmine, 88 Ill. 349; Corbitt *v.* Underwood, 83 Ill. 324; Pickering *v.* Cease, 79 Ill. 338; Pixley *v.* Boynton, 79 Ill. 351; Barnard *v.* Backhouse, 52 Wis. 593; Sawyer *v.* Taggart, 14 Bush, 727; Gregory *v.* Wendall, 39 Mich. 337; Shaw *v.* Clark, 49 Mich. 284; Gregory *v.* Wattoma, 58 Iowa, 711; Everingham *v.* Meighan, 55 Wis. 354; Rudolph *v.* Winters, 7 Neb. 125.

ferences in prices, they could be easily avoided and thrown out of court. But the contracts never assume the form of wagers on the price of the commodity. They are almost always undistinguishable from those option contracts, in which the parties in good faith have bargained for the refusal of the goods, and which are valid contracts.[1] There is no evidence on the face of the contract of the determination of the parties to settle on the differences in price; and while such a contract may be used as a cover for commercial gambling, it is not necessarily a wager on the future price of the commodity. It is the ordinary rule of law that where a writing is susceptible of two constructions, one of which is legal and the other illegal, that construction will prevail, which is in conformity with the law.[2] Applying this rule to the construction of option contracts, it has very generally been held that these contracts are valid and enforcible, unless it be proven affirmatively that the parties did not intend to make a delivery of the goods bargained for, but to settle on the differences.[3] And if it be

[1] The following is a good illustration of the ambiguity of the contract: "For value received, the bearer (S.) may call on the undersigned for one hundred (100) shares of the capital stock of the Western Union Telegraph Company, at seventy-seven and one-half (77½) per cent. at any time in thirty days from date. Or the bearer may, at his option, deliver the same to the undersigned at seventy-seven and one-half (77½) per cent., at any time within the period named, one day's notice required." Story *v.* Salomon, 71 N. Y. 420.

[2] "It is a general rule, that wheresoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken." Coke on Lyt. 42, 183.

[3] Story *v.* Salomon, 71 N. Y. 420; Kingsbury *v.* Kirwan, 71 N. Y. 612; Harris *v.* Lumbridge, 83 N. Y. 92; Williams *v.* Tiedemann, 6 Mo. App. 274; Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438, and cases cited in preceding notes. In delivering the opinion of the court, in Story *v.* Salomon, *sup.*, Earl, J., said: "On the face of the contract the plaintiff provided for the contingency that on that day he might desire to purchase the stock, or he might desire to sell it, and in either case there

shown that only one of the parties entertained this illegal intention, while the other acted in good faith, the contract will be void as to the first, but will be enforcible in behalf of the second.[1] This rule of construction is adopted by most of the courts, in determining the legality of these questionable contracts; but a different rule has been adopted in Wisconsin. The contract which constituted the subject of the suit, was in form a legitimate transaction, and there was no proof that it was used as a cover for commercial gambling. The court declared it to be the duty of the plaintiff to show that he had made a *bona fide* contract for the delivery of the commodities bought and sold, instead of throwing upon the defendant the burden of proving that the contract was made for the payment of differences in price, and did not contemplate any delivery of the grain.[2]

would have to be a delivery of the stock, or payment in damages in lieu thereof. We should not infer an illegal intent unless obliged to. Such a transaction, unless intended as a mere cover for a bet or wager on the future price of the stock, is legitimate and condemned by no statute, and that it was so intended was not proved. If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal."

[1] Rumsey *v.* Berry, 65 Me. 570; Williams *v.* Carr, 80 N. C. 94; Sawyer et al. *v.* Taggert, 14 Bush, 727; Gregory *v.* Wendall, 39 Mich. 337.

[2] The court claimed that it would "not do to attach too much weight or importance to the mere form of the contract, for it is quite certain that the parties will be astute in concealing their intention, as the real nature of the transaction, if it be illegal. It may be safely assumed, that the parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind, or outside of, the words of the contract — to look into the facts and circumstances which attended the making of it — in order to ascertain whether it was intended as a *bona fide* purchase and sale of the property, or was only colorable. And to justify a court in upholding such an agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or

It follows, as a consequence, if it be proved in any case that a commercial instrument had been given in settlement of the difference in prices in an option deal of the illegitimate sort, it is void and cannot be enforced, as between the immediate parties.[1] If the statute prohibiting stock gambling expressly declares commercial paper based upon such illegal transactions to be void, then the paper cannot be enforced by a *bona fide* holder;[2] but if, as is usually the case, there is no statutory provision of this kind, the paper will be valid in the hands of an innocent indorsee.[3]

§ 190. **Contracts in restraint of trade.** — Ever since the earliest days of English national life, contracts, having the object to restrain trade and commerce, have been declared to be illegal and void.[4] The most common form these contracts took was that of an agreement not to engage in a particular calling or trade. At an early day, it was held that all such agreements of every kind and degree were illegal. But since the rule originated as a consequence of the stringent regulations of the law relating to apprenticeship, — by which it was impossible for any one to ply a trade without having served a seven years' apprenticeship, — and these regulations were more and more relaxed, until they were completely abrogated in most of the United

as a cover for a gambling transaction." Barnard *v.* Backhouse, 52 Wis. 593. See, to the same effect, Cobb *v.* Prell, 15 Fed. Rep. 774.

[1] Fareria *v.* Gabell, 89 Pa. St. 89; Brua's Appeal, 55 Pa. St. 294; Smith *v.* Bouvier, 79 Pa. St. 325; Hawley *v.* Bibb, 69 Ala. 52; Tenney *v.* Foote, 4 Bradw. 594; Swartz's Appeal, 3 Brewst. 131. But see Hentz *v.* Jewel, 20 Fed. Rep. 592; Third Nat. Bank *v.* Linsley, 11 Mo. App. 498; Shaw *v.* Clark, 49 Mich. 384; Sawyer *v.* Macaulay, 18 S. C. 543; Third Nat. Bank *v.* Harrison, 3 McCreary, 316.

[2] Tenney *v.* Foote, 4 Bradw. 594.

[3] Broughton *v.* Manchester Water Works Co., 3 B. & Ald. 10; Day *v.* Stuart, 6 Bing. 109; *s. c.* 3 M. & P. 334.

[4] 1 Daniel's Negot. Inst. 195; 2 Parsons' Contracts, *748; Byles on Bills, 138.

States; the rule prohibiting all contracts which tended to restrain trade was reduced to a prohibition of all contracts which restrained the obligor from carrying on the trade anywhere, while it became lawful to make contracts which prohibited the prosecution of a trade or calling in some particular manner.[1] The limitations upon the restraint of trade which would make such restraint lawful may be in respect to the space, within which the business may not be carried on;[2] but the authorities do not agree how restricted

[1] In Alger *v.* Thacher, 19 Pick. 51, the leading case on the subject in this country, Judge Morton, delivering the opinion of the court, said: "Among the most ancient rules of the common law, we find it laid down, that bonds of restraint of trade are void. As early as the second year of Henry V. (A. D. 1415), we find by the year books that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and without exceptions. Then an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a *general* and a *limited* restraint of trade, which has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I. (A. D. 1621), Broad *v.* Jollyfe, Cro. Jac. 596, where it was holden, that a contract not to use a certain trade in a particular place was an exception to the general rule and not void. And in the great and leading case on this subject, Mitchell *v.* Reynolds, reported in Lucas, 27, 85, 130, Fortescue, 296, and 1 P. Wms. 181, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void; while those limited as to time, or place or persons, have been regarded as valid, and duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer." See also Chappel *v.* Brockway, 21 Wend. 157; Ross *v.* Sadgbeer, 21 Wend. 166; Jarvis *v.* Peck, 1 Hoff. Ch. 479; Bowser *v.* Blitz, 7 Blackf. 344; Grasselli *v.* Lowden, 11 Ohio St. 349.

[2] Nobles *v.* Bates, 7 Cow. 307; Kinsman *v.* Parkhurst, 18 How. 389; Mott *v.* Mott, 11 Barb. 127; Hulock *v.* Blacklowe, 2 Saund. 156, n. 1; Van

or extensive these limitations may be, in order that the restraint may be lawful.[1] But, in any case, in order to be legal, the limitations expressed to be imposed upon the operation of the contract in restraint of trade must be made in good faith, and not merely for the purpose of evading the law.[2] The limit may also be in respect to the persons, with whom the business is to be carried on; in other words the agreement may be not to do business with certain customers,[3] or not to conduct the business in a certain manner, subject to or against certain trade regulations.[4]

Following the reason of the rule, which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities and services. All combinations of capitalists and of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so

Marter *v.* Babcock, 23 Barb. 633; Davis *v.* Mason, 5 T. R. 118; Ward *v.* Byrne, 4 M. & W. 548; Lawrence *v.* Kidder, 10 Barb. 641; Mitchell *v.* Reynolds, 1 P. Wms. 190; Beard *v.* Dennis, 6 Ind. 200; Homer *v.* Ashford, 3 Bing. 323; Horner *v.* Graves, 7 Bing. 735; Bunn *v.* Guy, 4 East, 190.

[1] In Stearns *v.* Barrett, 1 Pick. 443, it was held lawful to make an agreement not to use certain machines in any of the Udited States, except two (Massachusetts and Rhode Island). See Dean *v.* Emerson, 102 Mass. 480; Thomas *v.* Miles, 3 Ohio St. 274. So, also, not to follow a trade or calling in, or within a certain distance (six, ten and twelve miles) of, a town. Smalley *v.* Greene, 52 Iowa, 241; Linn *v.* Sigsbee, 67 Ill. 75; Cook *v.* Johnson, 47 Conn. 175; McClurg's Appeal, 58 Pa. St. 51. On the other hand it has been held to be illegal to make a contract not to carry on a calling within the limits of a State. Taylor *v.* Blanchard, 13 Allen, 370; Wright *v.* Rider, 36 Cal. 342. But see, *contra*, Beal *v.* Chase, 31 Mich. 490.

[2] See Jones *v.* Lees, 1 H. & N. 189; Dunlop *v.* Gregory, 10 N. Y. 241.

[3] Mitchell *v.* Reynolds, 1 P. Wms. 190; Tallis *v.* Tallis, 1 El. & Bl. 391; Pemberton *v.* Vaughn, 12 Q. B. 87; Sainter *v.* Ferguson, 7 C. B. 716; Mallan *v.* May, 11 M. & W. 653; Green *v.* Price, 13 M. & W. 695; Price *v.* Green, 16 M. & W. 346; Davis *v.* Mason, 5 T. R. 118.

[4] Gross *v.* La Page, Holt, 105; Lightfoot *v.* Tenant, 1 Bos. & P. 552.

far illegal, that agreements to combine cannot be enforced in the courts, and constitute insufficient considerations for the commercial obligations that may be given in payment of penalties.[1]

§ 191. **Contracts in restraint of marriages,** — are also, on the ground of public policy, held to be void, and consequently insufficient considerations for commercial paper. This is not only true, where the restraint is general and without limit;[2] but also where it is limited in point of time.[3] But an agreement not to marry a particular person has been held to be a reasonable and lawful restraint upon marriage, which did not in any way offend public policy.[4] On the other hand, it has been held to be an unlawful restraint of marriage for one to promise a woman to marry no one but her.[5]

§ 192. **Contracts for the procurement of marriages and divorces.** — For the same reasons, contracts to pay money or to transfer other valuable property for procuring a marriage with [6] or divorce from some one, are void..[7]

[1] Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173; Stanton *v.* Allen, 5 Denio, 434; Brisbane *v.* Adams, 3 N. Y. 129; Noyes *v.* Day, 14 Vt. 384; Doolin *v.* Ward, 6 Johns. 194; Thompson *v.* Davies, 13 Johns. 112.

[2] 1 Parsons' N. & B. 214; Byles on Bills, 138; Hartley *v.* Rice, 10 East, 22; Lowe *v.* Peers, 4 Burr. 2225; Gibson *v.* Dickie, 3 M. & S. 463.

[3] Hartley *v.* Rice, 10 East, 22; Sterling *v.* Sinnickson, 2 South. 756.

[4] See Tiedeman on Real Prop., § 275.

[5] Lowe *v.* Peers, 4 Burr. 2225. But see Gibson *v.* Dickie, 3 M. & Sel. 463, where it was held to be lawful for a man to make a settlement of an annuity upon a woman, with whom he had an illicit intercourse, on condition that she remained single.

[6] Stribblehill *v.* Brett, 2 Vern. 445; Hall *v.* Potter, 3 Lev. 411; *s. c.* Show. P. C. 76; Roberts *v.* Roberts, 3 P. Wms. 66.

[7] Adams *v.* Adams, 25 Minn. 72; Sayles *v.* Sayles, 21 N. H. 312; Stoutenburgh *v.* Lybrand, 13 Ohio St. 228; Beard *v.* Beard, Cal. (1884) —; Muckenburg *v.* Holler, 29 Ind. 139; Everhart *v.* Puckett, 73 Ind. 409.

§ 193. **Contracts in fraud of creditors.** — Fraud of any kind vitiates the contract into which it enters; and this is true, not only when the fraud is actual, but also when it is legal or constructive. All contracts based upon fraud are void; and consequently all commercial paper issued in settlement of a fraudulent contract is void, except as against *bona fide* holders for value.[1] The contract is void, not only when the fraud is aimed at one of the parties to the contract, but also when it affects the interest of third persons, such as creditors. A note or bill issued in fraud of creditors is void.[2] The more common forms of contracts in fraud of creditors have relation to the settlement of an insolvent's estate in bankruptcy. The bankrupt and insolvent laws provide for an equal distribution of the assets among the creditors; and, therefore, when the debtor attempts to favor one or more of the creditors, at the expense of the others, either as an expression of friendly feeling, or as an inducement for the favored creditors to sign a composition deed, or to secure the bankrupt's discharge, the commercial paper, issued in performance of these illegal agreements, is void and cannot be enforced.[3]

But a note by husband to wife, for the consideration of her withdrawal of the divorce suit, is lawful. Adams *v.* Adams, 24 Hun, 401; *s. c.* 91 N. Y. 381. But see Van Orden *v.* Van Orden, 8 Hun, 315; Phillips *v.* Meyer, 82 Ill. 67.

[1] 1 Daniel's Negot. Inst. 193, 197; Gordon *v.* Clapp, 113 Mass. 335.

[2] Fay *v.* Fay, 121 Mass. 561; Powell *v.* Inman, 7 Jones, 28: Hamilton *v.* Scull, 25 Mo. 165; Fenton *v.* Ham, 35 Mo. 409.

[3] Cockshott *v.* Bennett, 2 T. R. 763; Jackson *v.* Lomas, 4 T. R. 166; Rose *v.* Main, 1 Bing. N. C. 356; *s. c.* 1 Scott, 127; Cooling *v.* Noyes, 6 T. R. 263; Leicester *v.* Rose, 4 East, 372; Davis *v.* Holding, 1 M. & W. 159; Bryant *v.* Christie, 1 Stark. 329; Lewis *v.* Jones, 4 B. & C. 511; Spurrett *v.* Spiller, 1 Atk. 105; Jackson *v.* Davison, 4 B. & Ald. 695; Took *v.* Tuck, 4 Bing. 224; Britton *v.* Hughes, 5 Bing. 400; Knight *v.* Hunt, 5 Bing. 432: Ex parte Sadler, 15 Ves. 55; Grimes *v.* Hillenbraud, 4 Hun, 354. *Consent to composition deed.* see Bryant *v.* Christie, 1 Stark. 329; Humphreys *v.* Welling, 1 Hurlst. & C. 7; Cockshott *v.* Bennett, 2 T. R. 763; Jackson *v.* Lomas, 4 T. R. 166; Case *v.* Gerrish, 15 Pick. 49; Har-

So, also, are commercial obligations void, which are given for commencing[1] or discontinuing bankruptcy proceedings.[2] And such contracts are illegal, although the sum to be paid to the favored creditor is not more than the amount of the debt originally due to him.[3]

The commercial obligations of third persons are also void, which are given for any of the considerations just mentioned, which operate in fraud of creditors, as well as the obligations of the debtor.[4] And a note, issued to a creditor to induce him to do some act in favor of the bankrupt, executed after the doing of the act, but agreed on beforehand, is illegal.[5]

§ 194. **Maintenance and champerty.** — Maintenance and champerty are offenses at common law, and consist of intermeddling in another's law suits, stirring up strife, and advancing the means, in the form of money or of services,

vey *v.* Hunt, 119 Mass. 279; Winn *v.* Thomas, 55 N. H. 294; Weaver *v.* Waterman, 18 La. Ann. 241; Doughty *v.* Savage, 28 Conn. 146. *Contracts to pay an extra sum as an inducement to favor or not oppose a bankrupt's discharge*, see Cockshott *v.* Bennett, 2 T. R. 763; Nerot *v.* Wallace, 3 T. R. 17; Sumner *v.* Brady, 1 H. Bla. 647; Davis *v.* Holding, 1 M. & W. 159; Murray *v.* Reaves, 8 B. & C. 421; Birch *v.* Jervis, 3 C. & P. 379; Holland *v.* Palmer, 1 Bos. & P. 95; Rogers *v.* Kingston, 2 Bing. 441; *s. c.* 10 Moore, 97; Baker *v.* Matlack, 1 Ashm. 68; Hayward *v.* Chambers, 5 B. & Ald. 753; Jackson *v.* Davison, 4 B. & Ald. 691; Simmons *v.* West, 2 Miles, 196; Robson *v.* Calze, 1 Doug. 228; Wiggin *v.* Bush, 12 Johns. 306; Sharp *v.* Teese, 4 Halst. 352; Austin *v.* Markham, 44 Ga. 161; Rice *v.* Maxwell, 21 Miss. 289.

[1] Payne *v.* Eden, 3 Caines, 213. It is claimed that an agreement to file petition in bankruptcy would be void although done by a *bona fide* creditor and with the knowledge of other creditors. See Edwards on Bills, § 381.

[2] Paton *v.* Stewart, 78 Ill. 481; Fell *v.* Cook, 44 Iowa, 485. See United States Rev. Stat., §§ 5120, 5131.

[3] Howe *v.* Litchfield, 3 Allen, 443; Rice *v.* Maxwell, 13 Sm. & M. 289

[4] 1 Daniel, 194; Bruce *v.* Lee, 4 Johns. 410; Bell *v.* Leggett, 7 N. Y. 176. But see *contra*, Fox *v.* Paine, 10 Ala. 523.

[5] Fay *v.* Fay, 121 Mass. 561; Howe *v.* Litchfield, 3 Allen, 443.

for prosecuting the suit. Agreements for remuneration for such loans or services are void and cannot be enforced, wherever the common law has not been changed by statute.[1]

§ 195. **Offenses against morality and religion.** — Commercial paper, given as a compensation for the commission of offenses against morality and religion, is illegal and of no force, as between the parties.[2] Thus a note has been held to be void, which was given as compensation for libeling another or selling libelous books;[3] for future illicit cohabitation[4] or for renting lodgings for purposes of prostitution.[5]

§ 196. **Usury.**[6] — At common law, it was lawful to exact any rate of interest that the parties may agree upon, and, although there have been statutes in force in England, which imposed a limitation, they have been since repealed,

[1] Master *v.* Miller, 4 T. R. 340; Flight *v.* Lemen, 4 Q. B. 883; Bell *v.* Smith, 5 B. & C. 188; Williamson *v.* Hanley, 6 Bing. 299; Stanley *v.* Jones, 7 Bing. 369; Alexander *v.* Polk, 39 Miss. 737; Thurston *v.* Percival, 1 Pick. 415; Lathrop *v.* Amherst Bank, 9 Met. 489; Martin *v.* Voeder, 20 Wis. 466; Byrd *v.* Odem, 9 Ala. 755; Holloway *v.* Lowe, 7 Porter, 488; Satterlee *v.* Frazer, 2 Sandf. 141; Rush *v.* Laru, 4 Litt. 417; Coughlin *v.* N. Y., etc., R. Co., 71 N. Y. 443; Martin *v.* Clarke, 8 R. I. 389; Orr *v.* Tanner, 12 R. I. 94; Quigley *v.* Thompson, 53 Ind. 317; Thompson *v.* Reynolds, 73 Ill. 11; Allard *v.* Lamiraude, 29 Wis. 502. See Schomp *v.* Schenck, 11 Vroom, 195.

[2] 1 Parsons, 214; 1 Daniel, 197; Jackson *v.* Duchaire, 3 T. R. 551.

[3] 1 Daniel, 197; Stockdale *v.* Onwhyn, 5 B. & C. 173; Fores *v.* Johnes, 4 Esp. 97.

[4] 1 Parsons, 214; 1 Daniel, 194. But it is held that a note will be good which has been given for a past offense of that kind. Ex parte Munford, 15 Ves. 289; Gibson *v.* Dickie, 3 M. & S. 463; Marchioness of Annandale *v.* Harris, 2 P. Wms. 432; Turner *v.* Vaughan, 2 Wils. 339; Smith *v.* Richards, 29 Conn. 232; Brown *v.* Kinsey, 81 N. C. 245; Shenk *v.* Mingle, 13 Serg. & R. 29.

[5] Jennings *v.* Throgmorton, Ry. & M. 251; Girardy *v.* Richardson, 1 Esp. 13.

[6] As to the constitutionality of the statutes against usury, see Tiedeman's Lim. Police Power, § 94.

thus reviving the old common-law rule.[1] In many of the United States, there are no statutes of this kind, but in the States given below, usury laws are found to be in force.[2]

It is not possible in an elementary work on commercial paper to discuss in detail the manifold ways in which the usury laws may be and are apparently evaded, and yet violated. Suffice it to say that it matters not what subterfuges may be resorted to, if in fact a larger return is exacted and obtained for the loan of money than the legal rate of interest, the commercial instrument is usurious, and comes under the condemnation of the usury laws.[3] The only difference is that, if the usurious character does not appear on the instrument, it can be enforced in favor of a *bona fide* holder without notice of its real character.[4]

[1] Byles on Bills, 140. Except as to securities upon real estate.

[2] Since the usury laws are being constantly changed by later statutes, the following statement can only be taken as approximately correct. The highest rate of interest that can be exacted is *six per cent.* in Delaware, Kentucky, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, West Virginia; *seven per cent.* in South Carolina; *eight per cent.* in Alabama, Illinois, Louisiana, North Carolina, Ohio, Virginia; *ten per cent.* in Indiana, Iowa, Michigan, Mississippi, Missouri, Tennessee, Wisconsin; *twelve per cent.* in Kansas, Minnesota, Nebraska, Oregon, Texas. If more than the lawful rate of interest is exacted, the entire interest is forfeited, the principal of the debt being alone recoverable, in Alabama, Illinois, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Texas, Wisconsin. In Missouri, the interest at ten per cent is forfeited and paid over to the school fund. The unlawful excess of interest is forfeited, leaving the principal and lawful interest recoverable in Iowa, Kansas, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia. In New Hampshire, the legal rate and principal can be recovered, but a penalty may be recovered by any one who chooses to sue for it, equal to treble the amount of the usurious interest. The entire debt with interest is forfeited in Delaware, Louisiana, and in Oregon, the debt with interest is paid over to the school fund.

[3] Rose *v.* Dickson, 7 Johns. 196; Whipple *v.* Powers, 7 Vt. 457; White *v.* Wright, 5 D. & R. 110; Barnard *v.* Young, 17 Ves. 44.

[4] Rockwell *v.* Charles, 2 Hill, 499; Holmes *v.* Williams, 10 Paige, 326; McKnight *v.* Wheeler, 6 Hill, 492; Brummel *v.* Enders, 18 Gratt. 873. But

But it is not usurious to exact compound interest, although it is on other grounds unlawful to exact compound interest, at least when the agreement is made before the interest has accrued.[1] It is lawful however to agree to pay interest on interest, after the interest has already accrued,[2] or to provide beforehand for the compounding of interest as a penalty for the non-payment of the interest when it accrues.[3]

Nor is it usurious to provide for the payment of exchange in a paper, payable in a different place, in addition to the legal rate of interest, provided the market rate of exchange be alone exacted.[4] Nor is it usury to omit a charge for exchange where the rate is in favor of the place of payment.[5] But if such an agreement, whether for exchange, or for payment at par, when the exchange was at premium, is made with an usurious intent, it is illegal for that reason.[6]

Whether it is usurious to include a charge for attorney's fees and commissions, has been decided by the courts in both the affirmative[7] and in the negative.[8] But the com-

in New York and other States, under the statute of that State, the paper is void in any event even in the hands of a *bona fide* holder for value. Wilkie *v.* Roosevelt, 3 Johns. 66, 206; Altenheimer *v.* Cook, 11 Heisk. 309.

[1] Townsend *v.* Corning, 1 Barb. 627; Miner *v.* Paris Exch. Bank, 53 Tex. 559.

[2] Hamilton *v.* Le Grange, 2 H. Bl. 144; Fobes *v.* Canfield, 3 Ohio, 17; Watkinson *v.* Root, 4 Ohio, 373; Leonard *v.* Mason, 1 Wend. 521.

[3] Greenleaf *v.* Kellogg, 2 Mass. 568; Pierce *v.* Rowe, 1 N. H. 179. In Missouri, the statute authorizes the compounding of interest on yearly rests. Mo. Rev. Stat. 1879, § 2728.

[4] Marvine *v.* Hymers, 12 N. Y. 223; Merritt *v.* Benton, 10 Wend. 117.

[5] Bank of U. S. *v.* Waggener, 9 Pet. 378; Cuyler *v.* Sanford, 13 Barb. 339.

[6] Ontario Bank *v.* Schermerhorn, 10 Paige, 109; Churchman *v.* Martin, 54 Ind. 380; Seneca Co. Bank *v.* Schermerhorn, 1 Denio, 133.

[7] Bean *v.* Jones, 8 N. H. 149; Myer *v.* Hart, 40 Mich. 517; Miller *v.* Gardner, 49 Iowa, 234.

[8] Gaar *v.* Louisville Banking Co., 11 Bush, 180.

missions of one who indorses or guarantees commercial paper for accommodation will not be usurious, although larger than the legal rate of interest.[1]

If a paper is originally free from the charge of usury, it will not be invalid because of a subsequent usurious contract in connection with its transfer, so as to prevent a recovery on it by the indorsee against the maker or acceptor.[2] And although the discount of more than the legal rate of interest in the transfer of commercial paper is ordinarily usurious, as between the indorsee and his immediate indorser, it is not always so. Where, in good faith, and without an intention to violate the usury law, an indorsee buys an instrument of indebtedness at a discount below par greater than the legal rate of interest, on account of the greater risk of losing his money, by the failure of the party or parties to the instrument, it is not a usurious contract, although the paper is accompanied by a guaranty that the indorsee will receive payment of the face.[3] But such an indorsee is a holder for value only for the amount he paid for the paper with lawful interest.[4]

Finally, the renewal of an usurious paper will not purge the transaction of its unlawful character, unless in the

[1] Ketchum *v.* Barber, 4 Hill, 224; Suydam *v.* Westfall, 4 Hill, 211; Barber *v.* Ketchum, 7 Hill, 444; Moore *v.* Howland, 4 Denio, 264; Trotter *v.* Curtis, 19 Johns. 160; Suydam *v.* Bartle, 10 Paige, 94; De Forest *v.* Strong, 8 Conn. 513.

[2] Pollard *v.* Scholey, Cro. Eliz, 20; *s. c.* 1 Saund. 294; Wood *v.* Grimwood, 10 B. & C. 679; Phillips *v.* Cockagne, 3 Campb. 119; Parr *v.* Eliason, 1 East, 92; Knight *v.* Putnam, 3 Pick. 184; French *v.* Grindle, 15 Me. 163; Farmer *v.* Sewall, 16 Me. 456; Stewart *v.* Bramhall, 11 Hun, 139; Archer *v.* Shea, 14 Hun, 493. But where the paper is not in fact negotiated, until it is indorsed, of course, the usurious character of the indorsement taints the whole contract. Tufts *v.* Shepherd, 49 Me. 312; Eastman *v.* Shaw, 65 N. Y. 522.

[3] Rapelye *v.* Anderson, 4 Hill, 472; Brummel *v.* Enders, 18 Gratt. 873; Holmes *v.* Williams, 10 Paige, 326.

[4] Faut *v.* Miller, 17 Gratt. 77; Saylor *v.* Daniels, 37 Ill. 331.

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renewal only the principal sum with lawful interest is reserved.[1] Merely changing the form of the paper in the renewal will leave the contract usurious still.[2] But where some third person gives a note or other commercial obligation in satisfaction of another's usurious obligation, the new obligation is valid and free from the taint of usury, the giving of the new paper amounting to a payment of the old debt and a consequent waiver of the statutory defense of usury.[3] And where the original debt was legal, and a usurious obligation is substituted for the original debt is still valid, notwithstanding the substituted paper is invalid on account of usury.[4]

§ 197. **Violations of the banking acts.** — The banking laws of the United States and of the several States, in the regulation of banks and banking, frequently prescribe limitation on the power of the banking companies in the negotiations of loans, and the issue of its commercial paper. Whenever a bank issues a note or other written obligation in payment of a debt prohibited by these laws, it is illegal and void between the immediate parties.[5] Thus it is illegal

[1] Barnes *v.* Headley, 2 Taunt. 184; Marchant *v.* Dodgin, 2 Moore & S. 632; Wright *v.* Wheeler, 1 Campb. 165; *s. c.* 2 Stark. 238; Scott *v.* Lewis, 2 Conn. 132; Church *v.* Tomlinson, 2 Conn. 134, n.; Campbell *v.* Sloan, 62 Pa. St. 481.

[2] Campbell *v.* Sloan 62 Pa. St. 481; Bell *v.* Lent, 24 Wend. 236; Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346. And this is true although in consequence of the renewal, as a new consideration, an intervening note to a third person had been cancelled. Archer *v.* McCrary, 59 Ga. 547. But see Drake *v.* Chandler, 18 Gratt. 909.

[3] Wales *v.* Webb, 5 Conn. 154; Macungie Saving Bank *v.* Hottenstein, 89 Pa. St. 328.

[4] Gray *v.* Fowler, 1 H. Bl. 462. Such a renewal is void, although the usurious premiums be provided for in a separate note. Swartout *v.* Payne, 19 Johns. 294.

[5] Brown *v.* Torkinton, 3 Wall. 377; Swift *v.* Beers, 3 Denio, 70; Springfield Bank *v.* Merrick, 14 Mass. 322; Reynolds *v.* Nichols, 12 Iowa, 399. And the trust deed given to secure the payment of the paper so illegally issued is also void. Leavitt *v.* Palmer, 3 N. H. 19.

in some of the States for banking companies to make loans to stockholders for more than half the value of the stock held by them, and a note given for the excess is void.[1] So, also, is it prohibited by statute in some States for banks to take certain currency, both foreign and domestic, and a commercial paper based on the receipt of the prohibited currency is illegal and void.[2]

§ 198. **Other illegal considerations — Knowledge of illegal intent.** — It is impossible to give a detailed statement of the various considerations which are made illegal by statute. Suffice it to say that whenever a statute makes a transaction illegal, a commercial obligation, given in settlement of the transaction, is void on account of this illegality of the consideration.[3]

[1] Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

[2] Springfield Bank *v.* Merrick, 14 Mass. 322; Merchants' Bank *v.* Spaulding, 9 N. Y. 53; Bank of Chillicothe *v.* Dodge, 8 Barb. 233; *s. c.* 15 N. Y. 53. But where the agreement to deliver the prohibited bills is not performed, and instead of it lawful bills are transferred as a consideration, the note given for it will be valid. Noble *v.* Cornell, 1 Hilt. 98.

[3] Hatch *v.* Burroughs, 1 Woods 439; Vallett *v.* Parker, 6 Wend. 615; Nerot *v.* Wallace, 3 T. R. 17; Waymell *v.* Reed, 5 T. R. 599; Bensley *v.* Bignold, 5 B. & Ald. 335; Hodgson *v.* Temple, 5 Taunt. 181; Langton *v.* Hughes, 1 M. & S. 593; Bank of Louisville *v.* Young, 37 Mo. 398. This is true, also, where the act is impliedly prohibited by the imposition of a penalty. 1 Parsons' Notes & Bills, 213; Griffith *v.* Wells, 3 Denio, 226. The rule is also the same, where the consideration is the transfer of a contract which is prohibited by statute. Cummings *v.* Jaux, 30 La. Ann. 207. For obligations issued in violation of revenue and license laws, see Biggs *v.* Lawrence, 3 T. R. 454; Banks *v.* Colwell, 3 T. R. 81; Lightfoot *v.* Tenant, 1 Bos. & P. 551; Vandyck *v.* Hewitt, 1 East, 97; Hodgson *v.* Temple, 5 Taunt. 181; Taylor *v.* Crowland Gas Co., 10 Exch. 2937; Armstrong *v.* Toler, 11 Wheat. 258; De Beginnis *v.* Armistead, 10 Bing. 107; *s. c.* 3 M. & P. 511; Langton *v.* Hughes, 1 M. & S. 596; May *v.* Williams, 27 Ala. 267. But a note is good which is given for a bid to an unlicensed auctioneer. Gunnaldson *v.* Nyhus, 27 Minn. 44. For violations of the Sunday laws, see Drury *v.* De Fontaine, 1 Taunt. 131; Scarfe *v.* Morgan, 4 M. & W. 270; Simpson *v.* Nichols, 3 M. & W. 240; Kouts *v.* Dickson,

Not only is a commercial obligation void, which is given for the commission of an unlawful act, but likewise when it was given for furnishing the means of violating the law, whether it be money or merchandise.[1] It has been held that the mere knowledge of the vendor that the goods he is selling are to be used in the furtherance of an illegal cause, without his participation in that illegal intention, will not invalidate a note given for the purchase money.[2] And this is held to be the true rule, especially where the articles, which were sold for an illegal purpose, are in themselves innocent.[3] But in some of the courts it has been held that the seller need not participate in any way in the violation of the law; simply a knowledge on his part of the intention to make an unlawful use of the goods he sells, will invalidate a note or bill given for the purchase-money.[4] The

40 Miss. 341. For violations of the liquor laws, see Hubbell *v.* Flint, 13 Gray, 277; Caldwell *v.* Wentworth, 14 N. H. 431; Carlton *v.* Bailey, 27 N. H. 230; Inhabitants of Webster *v.* Sanborn, 47 Me. 471; Turck *v.* Richmond, 13 Barb. 533; Griffith *v.* Wells, 3 Denio, 226; Cottle *v.* Cleaves, 70 Me. 256; Doolittle *v.* Lyman, 44 N. H. 608; Paton *v.* Coitt, 5 Mich. 505; Baker *v.* Collins, 9 Allen, 253. See generally, Oulds *v.* Harrison, 10 Exch. 572; Hall *v.* Franklin, 3 M. & W. 259; Grant *v.* Welchman, 16 East, 207; Walker *v.* Johnson, 2 Cranch C. C. 203; Lorentz *v.* Conner, 69 Ga. 761; Johnston *v.* McConnell, 65 Ga. 129.

[1] 1 Parsons' N. & B. 214; De Groot *v.* Van Duzer, 20 Wend. 390; Cannan *v.* Bryce, 3 B. & Ald. 179; McKinnell *v.* Robinson, 3 M. & W. 434; Blount *v.* Proctor, 5 Blackf. 265; Tracy *v.* Talmage, 14 N. Y. 162.

[2] Hodgson *v.* Temple, 5 Taunt. 181; James *v.* Planters, 9 Heisk. 455; Puryear *v.* McGavock, 9 Heisk. 461. In Bank of Tennessee *v.* Cummings, 9 Heisk. 470, the note was given for money loaned for the express purpose of making saltpetre for the government of the Southern Confederacy. For a similar purpose, see McGavock *v.* Puryear, 6 Coldw. 34, where liquor is sold with knowledge of the intention to sell it again in retail in violation of the license laws. Kreiss *v.* Seligman, 8 Barb. 439. See also Gaylord *v.* Soragen, 32 Vt. 110, where there was knowledge of an intention to use the goods in violation of the laws of another State. See, further, Gardner *v.* Maxey, 9 B. Mon. 90; Coppock *v.* Bower, 4 M. & W. 361; Clark *v.* Recker, 14 N. H. 44.

[3] Henderson *v.* Waggoner, 2 Lea, 133; Benjamin on Sales, § 506.

[4] Lightfoot *v.* Tenant, 1 Bos. & Pul. 551, where arsenic was sold with

Supreme Court of the United States distinguish in this connection between illegal acts which are heinous in character, and those which constitute only trivial misdemeanors; holding in the former case that the mere knowledge of an illegal intention is sufficient to invalidate the commercial paper, while in the latter a participation in the unlawful act is held to be necessary.[1] But it is certain that the seller must know that the buyer intends to make an unlawful use of the goods, in order that the obligation given for the purchase-money may be invalidated.[2] And a mere suspicion,

the knowledge that the purchaser intended to poison his wife with it; Langton *v.* Hughes, 1 Maule & Sel. 593, where harmful drugs are sold with knowledge that they were to be used in brewing; Hubbell *v.* Flint, 13 Gray, 277; Wilson *v.* Stratton, 47 Me. 120; Banchor *v.* Mansel, 47 Me. 58, where liquor was sold in one State with knowledge that it was to be sold in another State in violation of law; Canaan *v.* Bryce, 3 B. & Ald. 179; De Groot *v.* Van Duzer, 20 Wend. 390, where money was loaned for the purpose of enabling the borrower to settle his losses in an illegal stock-jobbing transaction; Hanauer *v.* Doane, 12 Wall. 342, where goods were sold with knowledge that they were to be used in the Confederate service. See to the same effect, Tatum *v.* Kelly, 25 Ark. 209; Booker *v.* Robbins, 26 Ark. 660; Oxford Iron Co. *v.* Spradley, 51 Ala. 171; Logan *v.* Plummer, 70 N. C. 388. See Webster *v.* Munger, 8 Gray, 584. But the burden of proof is on the maker of the paper to show that the payee had knowledge of the illegal intent. Converse *v.* Foster, 32 Vt. 828.

[1] "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude when he knows, or has every reason to believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. * * * There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality; or cases in which the unlawful act was committed already, and the loan was an independent contract, made not to enable the borrower to commit the act, but to pay obligations, which he had already incurred in committing it." Bradley, J., in Hanauer *v.* Doane, 12 Wall. 342.

[2] Ely *v.* Webster, 102 Mass. 304. And it will not affect the validity of the paper if the seller did not know at the time that the intended act was illegal. Stone *v.* Hooker, 9 Cow. 154. Coventry *v.* Barton, 17 Johns. 142.

or even conviction, without actual knowledge, of an intention to violate the law, is not sufficient.[1] For example, although it may be unlawful to lend money to a gambler for the purpose of engaging in gambling,[2] it will not be sufficient to invalidate a loan to a gambler, simply because it is known that the borrower is a gambler, and is likely to gamble with any money he may get hold of.[3]

Where partners in illegal transactions, in the settlement of them, provide for a division of the profits by the giving of notes to each other, it is held by some of the authorities that the notes are nevertheless valid.[4] But this rule has in a number of cases been doubted and in some denied.[5]

§ 199. **How illegal considerations may be purged.** — A simple renewal of a paper void on account of illegality does not relieve it of this defect.[6] But when an entirely new paper, with new parties and with a consequent change of liability and the introduction of a new consideration, is substituted for the invalid paper, — as where a third person gives his note in payment or settlement of the invalid note, — the second paper is valid and binding, notwithstanding its illegal origin.[7] The illegality is purged also, when,

[1] Savage *v.* Mallory, 4 Allen, 492.

[2] McKinnell *v.* Robinson, 3 M. & W. 434; Cutler *v.* Welch, 43 N. H. 497; Mordecai *v.* Dawkins, 9 Rich. 262.

[3] 1 Parsons' N. & B. 214.

[4] See Brooks *v.* Martin, 2 Wall. 10; Planters' Bank *v.* Union Bank, 16 Wall. 483; De Leon *v.* Trevino, 49 Tex. 88; Boggess *v.* Lilly, 18 Tex. 200; Finkney *v.* Reynous, 4 Burr. 2069; Petire *v.* Hannay, 3 T. R. 418; Sharp *v.* Taylor, 2 Phillips' Ch. 801; Armstrong *v.* Toler, 11 Wheat. 258; McBlair *v.* Gibbs, 17 How. 236.

[5] See Aubert *v.* Maze, 2 B. & P. 373; Mitchell *v.* Cockburne, 2 H. Bl. 379; Canaan *v.* Bryce, 3 B. & Ald. 183; Woodworth *v.* Burnett, 43 N. Y. 273; *s. c.* 30 Am. Rep. 106, 112, note; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173.

[6] See *ante*, § 180.

[7] Wales *v.* Webb, 5 Conn. 154; Stone *v.* Smith, 6 Munf. 541; Law's Exr. *v.* Sutherland, 5 Gratt. 357; Drake *v.* Chandler, 18 Gratt. 912;

after the transfer of the illegal paper to a *bona fide* purchaser without notice, a new paper payable to the indorsee is substituted for it.[1] So, also, where an illegal note is surrendered, and one given in its place to a third person to whom the payee of the original paper is indebted, and the second paper is made payable to the creditor in satisfaction of the debt due to him.[2] And the illegality has been held to be purged by the substitution of a joint note, having a new party as surety for the old illegal paper.[3]

§ 200. **Inadequacy of consideration.** — Mere inadequacy of consideration will not constitute a defense, in whole or in part, to an action on the paper. Although a valuable and substantial consideration is necessary to the validity of a commercial instrument, it is not necessary that it shall be equal in value to the amount due on the instrument.[4] And where the consideration is not pecuniary and its value is not easily computed in money, the most extreme inade-

Windham *v.* Doles, 59 Ga. 266. And it does not affect the legality of the new security, that the principal of the old paper becomes a surety in the new. Drake *v.* Chandler, 18 Gratt. 909.

[1] Cuthbert *v.* Haley, 8 T. R. 390; Calvert *v,* Williams, 64 N. C. 168; Drake *v.* Chandler, 18 Gratt. 912; Torbett *v.* Worthy, 1 Heisk. 107.

[2] Regina *v.* Sewell, 7 Mod. 118; Macungie Sav. Bank *v.* Hottenstein, 89 Pa. St. 328; Sherwood *v.* Archer, 17 N. Y. S. C. (10 Hun.) 73; Drake *v.* Chandler, 18 Gratt. 912. But see King *v.* Perry Ins. Co., 57 Ala. 118, where an indorser of an illegal bill took it up with a new bill, on which he appeared as an acceptor, and it was held that the new bill was tainted with the illegality. And see, also, First Nat. Bank *v.* Plankinton, 27 Wis. 177.

[3] Gresham *v.* Morrow, 40 Ga. 487. But see *contra*, Campbell *v.* Stone, 62 Pa. St. 481.

[4] 1 Daniel's Negot. Inst., § 180; 1 Parsons, 211; Earl *v.* Peck, 64 N. Y. 598; Worth *v.* Case, 42 N. Y. 362; Cowee *v.* Cornell, 75 N. Y. 91; Miller *v.* McKenzie, 95 N. Y. 595; Morgan *v.* Richardson, 7 East, 482; Tricky *v.* Larne, 6 M. & W. 278; Tye *v.* Gwynne, 2 Campb. 346; Wheelock *v.* Barney, 27 Ind. 462.

quacy will not affect the validity of the paper.[1] But where the consideration was money loaned, or a liquidated debt, only the amount of the consideration can be recovered, any additional obligation being deemed in equity an unlawful penalty.[2]

Where, however, there is a depreciated paper currency, and a consequent premium on gold and silver, the parties to a commercial paper may agree to its payment in coin, and it will not be a defective consideration, if the coin-paying paper be taken up by the execution of an instrument, which is made payable in currency, and which calls for the payment of the amount of the original paper together with the premium on gold ruling at its maturity.[3] But a stipulation in the coin-paying obligation, that if not paid at maturity judgment shall be rendered for the value of the coin at the time of rendering the judgment, is viewed in the light of a penalty.[4]

§ 201. **Failure of consideration, total and partial.** — A total failure of consideration will avoid a commercial instrument resting upon it as completely as an original want of consideration; and it constitutes a good defense to an action upon the instrument, except as against holders for value and without notice.[5] If a subsequent indorsee takes

[1] Earl *v.* Peck, 64 N. Y. 598; Wells, J., in Sawyer *v.* Louth, 46 Barb 353.

[2] See Report of Judges, 3 Bin. 59; Bailey *v.* Rogers, 1 Greenl. 186; Whitney *v.* Slayton, 40 Me. 224; Seney *v.* Blacklin, 2 Mass. 541; Bond *v.* Cutler, 10 Mass. 419; Walcott *v.* Harris, 1 R. I. 404; Garnett *v.* Yoe, 17 Ala. 74; Rubon *v.* Stephen, 25 Miss. 253; Cairnes *v.* Knight, 17 Ohio St. 68; Trice *v.* Turrentine, 13 Ired. 212; Toles *v.* Cole, 11 Ill. 562; Stose *v.* People, 25 Ill. 600; Eggleston *v.* Buck, 31 Ill. 254; Fontaine *v.* Aresta, 2 McLean, —; Blakemore *v.* Wood, 3 Sneed (Tenn.), 470; Warren *v.* Gordon, 10 Wis. 499.

[3] Smith *v.* McKinney, 22 Ohio St. 200; Williams *v.* Boozeman, 18 La. Ann. 532; Cox *v.* Smith, 1 Nev. 161.

[4] Hastings *v.* Johnson, 2 Nev. 190.

[5] Jeffries *v.* Austin, Stra. 647; Solly *v.* Hinde, 2 C. & M. 516; *s. c.* 6

the paper with notice of the failure of consideration the defense will prevail against him. But he will not be charged with notice of a defect and with the duty of putting himself on inquiry, if a memorandum is put upon the paper, indicating what the consideration was.[1] The maker waives the defense if he takes up the paper by giving a new instrument to the indorsee, who holds it.[2] And, of course, under the proper circumstances, the maker may be estopped from setting up the defense.[3] In Louisiana, if a note contains the words "without plea or offset," action on it cannot be resisted by the defense of failure of consideration.[4]

The authorities are not quite uniform in respect to the effect of a partial failure of consideration; but the general rule is that a partial failure will be a good defense *pro tanto* to an action on a commercial instrument.[5] Some authorities admit partial failure to be a defense, only when the extent of the failure can be definitely ascertained and computed in money;[6] while some other

C. & P. 316; Jackson *v.* Warwick, 7 T. R. 121; Wells *v.* Hopkins, 5 M. & W. 7; Case *v.* Boughton, 11 Wend. 109; Tallmadge *v.* Wallis, 25 Wend. 107; Anthony *v.* Harrison, 14 Hun, 198; Starr *v.* Torry, 2 Zab. 190; Roots *v.* Merriwether, 8 Bush, 397; Gage *v.* Lewis, 68 Ill. 604. The defense prevails as well against a renewal of the paper. Commonwealth Ins. Co. *v.* Whitney, 1 Met. 21; Hooker *v.* Hubbard, 97 Mass. 175; *s. c.* 102 Mass. 239.

[1] Hennebury *v.* Morse, 56 Ill. 394

[2] Griffith *v.* Trabue, 11 Heisk. 645.

[3] Carruth *v.* Carter, 26 La. Ann. 331.

[4] Grand Gulf *v.* Stanborough, 1 La. Ann. 261.

[5] Darnall *v.* Williams, 2 Stark. 166; Peded *v.* Moore, 1 Stew. & P. 71; Wyckoff *v.* Runyon, 4 Vroom, 107; Jeffries *v.* Austin, Stra. 647; Black *v.* Ridgway, 131 Mass. 80; Morgan *v.* Fallenstein, 27 Ill. 31; Sawyer *v.* Chambers, 44 Barb. 42; Gamble *v.* Grimes, 2 Ind. 392; Petillo *v.* Hopson, 23 Ark. 196; Nations *v.* Thomas, 25 Tex. 221; Edwards *v.* Porter, 2 Coldw. 42; Guild *v.* Belcher, 119 Mass. 257; Smith *v.* Ackerman, 5 Blackf. 541; Moore *v.* Lanham, 3 Hill (S. C.), 299; Bar *v.* Baker, 9 Mo. 840; Coburn *v.* Ware, 30 Me. 202; Francis *v.* Miller, 8 Md. 274; Holzworth *v.* Koch, 26 Ohio St. 33; Griffey *v.* Payne, 1 Morris, 68.

[6] Day *v.* Nix, 9 Moore, 159; Morgan *v.* Richardson, 1 Campb. 40 n.;

cases hold that it does not constitute a good defense, whether the failure be definite or indefinite.[1] But in many of the States where this rule was followed, it is now changed by statute, thus enabling a partial failure of consideration to be set up as a defense.[2]

§ 202. **Failure in title.** — The failure to give a good title to land or personal property, which has been sold, is always a good defense; and if the entire title fails, it will be a total failure, otherwise only a partial failure of consideration.[3] If there is in fact a failure of title that cannot be cured, the maturity of the note given for the purchase-money, before the maker is according to the con-

Tye *v.* Gwynne, 2 Campb. 346; Walker *v.* Smith, 2 Vt. 539; Hinton *v.* Scott, Dudley (Ga.), 245; Allen *v.* Bank of the United States, Spenc. 216.

[1] See Fletcher *v.* Chase, 16 N. H. 38; Drew *v.* Towle, 27 N. H. 455; Stone *v.* Peake, 16 Vt. 218; Harrington *v.* Lee, 33 Vt. 249; Richardson *v.* Sanborn, 33 Vt. 75; Burton *v.* Schermerhorn, 21 Vt. 289; Foster *v.* Phaley, 35 Vt. 303; Briggs *v.* Boyd, 137 Vt. 534; Washburn *v.* Picot, 3 Dev. 390; Evans *v.* Williamson, 79 N. C. 96; Jordan *v.* Jordan, Dudley, 181. In some of the cases, cited in support of the above stated proposition, the gist of the controversy would rather seem to be whether there was any failure of consideration at all, as where an incumbrance hangs over a title to land, which had been purchased. See Greenleaf *v.* Cook, 2 Wheat. 13; Jenness *v.* Parker, 24 Me. 289; Morrison *v.* Jewell, 34 Me. 146; Thompson *v.* Mansfield, 43 Me. 490; Chase *v.* Weston, 12 N. H. 413; Lattin *v.* Vail, 17 Wend. 188; Martin *v.* Foreman, 18 Ark. 249; Smith *v.* Ackerman, 5 Blackf. 541; Reese *v.* Gordon, 19 Cal. 147.

[2] Statutes of this kind are to be found in Colorado, Florida, Georgia, Illinois, Indiana, Iowa, New Hampshire, Texas and Vermont. 2 Randolph Com. Paper, § 540 n.; Stafford *v.* Anders, 8 Fla. 38; Simmons *v.* Blackman, 14 Ga. 318; Williams *v.* Warnell, 28 Tex. 610. In Vermont, the statute permits the defense to be set up only against the original parties to the instrument, and not against an indorsee, or other subsequent holder with notice of the defense. Farrar *v.* Freeman, 44 Vt. 63; Thrall *v.* Horton, 44 Vt. 386.

[3] Rock *v.* Nichols, 3 Allen, 342; Bliss *v.* Clark, 88 Mass. 60; Morrow *v.* Brown, 31 Ind. 378; Peterson *v.* Johnson, 22 Wis. 21; Stewart *v.* Insall, 9 Tex. 397; Wheeler *v.* Standley, 50 Mo. 509; Wright *v.* McDonald, 44 Ga. 452; Scudder *v.* Andrews, 2 McLean, 464; Heaton *v.* Myers, 4 Col. 59.

tract of sale entitled to the deed, will not prevent the failure of consideration being set up as a defense to the action on the note.[1]

But a mere defect of title does not constitute such a failure of consideration as will avoid the contract. A note or bill given for the purchase-money can be sued on, notwithstanding the existence of a defect in the title to the property, as long as the possession of the purchaser has not been disturbed. As a general rule, eviction, either actual or constructive, in consequence of the defect, is necessary to make the failure of consideration an effective defense.[2] But it has been held that where the contract of sale is rescinded on account of an existing defect in the title, there is an effective failure of consideration, without waiting for an eviction. One can refuse to perform his part of the contract, when the other party fails to tender a full performance of his part.[3] The mere existence of an incumbrance over the title, such as a mortgage, a judgment, an outstanding dower right, does not constitute a failure of consideration.[4] But if the incumbrance is paid or satisfied by the purchaser, it will be a partial failure of the consideration to the amount of the incumbrance.[5] But

[1] Garrett *v.* Crosson, 32 Pa. St. 373. But it is not considered a failure, if the title happens not to be complete when the note matured. Spiller *v.* Westlake, 2 B. & Ad. 155.

[2] Wilson *v.* Jordan, 3 Stew. & P. 92; Lynch *v.* Baxter, 4 Tex. 431; Rice *v.* Goddard, 14 Pick. 293; Lothrop *v.* Snell, 11 Cush. 453; Wade *v.* Killough, 3 Stew. & P. 431; Baldridge *v.* Cook, 27 Tex. 565. But see *contra*, Sumter *v.* Welsh, 1 Brev. 539.

[3] Bringham *v.* Leighty, 61 Ind. 524; Wade *v.* Killough, 3 Stew. & P. 431.

[4] Cheny *v.* City Nat. Bank, 77 Ill. 562; Pomeroy *v.* Burnett, 8 Blackf. 142; Greenleaf *v.* Cook, 2 Wheat. 13; Chase *v.* Weston, 12 N. H. 413; Jenness *v.* Parker, 24 Me. 289; Thompson *v.* Mansfield, 43 Me. 490; Lattin *v.* Vail, 17 Wend. 188; Smith *v.* Ackerman, 5 Blackf. 541; Martin *v.* Foreman, 18 Ark. 249.

[5] Doremus *v.* Bond, 8 Blackf. 368; Holman *v.* Creagmiles, 14 Ind. 177; Zebley *v.* Sears, 38 Iowa, 507; Miller *v.* Gibbs, 29 Ind. 228; Riddle *v.* Gage, 37 N. H. 519; Lapene *v.* Delaporte, 27 La. Ann. 252.

where the incumbrance is bought in at less than its face value, only the amount paid for it can be set up in defense of the instrument of indebtedness.[1]

When one gives a quit-claim deed to a tract of land, purporting to convey simply all his right, title and interest, a want of title does not constitute a failure of consideration, unless there be fraud or misrepresentation.[2] Nor would a mere irregularity in the execution of the deed of conveyance, be a failure of consideration, if a substantial title was secured which could be perfected by an appropriate action in equity.[3]

§ 203. **Failure in value.** — As a matter of course, if goods are sold, and prove to be absolutely worthless, there is a total failure of consideration, which will operate as a defence to an action on a bill or note given for the goods.[4] And where an article is purchased for a particular purpose, and it turns out to be worthless for that purpose, either on account of difference in quality or quantity, it will be a total failure of consideration, even if the article has value for other purposes.[5] And the authorities all agree that

[1] McDowell *v.* Milroy, 69 Ill. 498.

[2] Owings *v.* Thompson, 4 Ill. 502; Coudrey *v.* West, 11 Ill. 146; Kerney *v.* Gardner, 27 Ill. 162. And it has been held that there is no failure of consideration in the sale of a pre-emption right, which has been rendered valueless by the assertion of a paramount title. Ferguson *v.* McCain, 23 Ark. 210. See also Foy *v.* Haughton, 85 N. C. 168, where it is held that the want of title does not constitute a failure of consideration, unless the transaction is complicated with fraud.

[3] Lee *v.* White, 4 Stew. & P. 178; Brinkley *v.* Bethel, 9 Heisk. 786; Rock *v.* Heald, 27 Tex. 523.

[4] Crocker *v.* Crane, 21 Wend. 211; Payne *v.* Cutler, 13 Wend. 605; French *v.* Gordon, 10 Kan. 370; Merrill *v.* Gamble, 46 Iowa, 615; Ferguson *v.* Oliver, 8 Sm. & M. 332; Rogers *v.* McKnight, 4 J. J. Marsh. 154; Clough *v.* Patrick, 37 Vt. 421; Pierce *v.* Stocking, 11 Gray, 174; Cragin *v.* Fowler, 34 Vt. 326.

[5] Agra, etc., Bank *v.* Leighton, L. R. 2 Exch. 56; Starr *v.* Toney, 2 Bab. 190; Barr *v.* Baker, 9 Mo. 840.

where money is the consideration, a partial failure in the amount will be a good defense.[1] But it may be stated as a general rule that a slight failure in the value of the goods sold, which is not easily determinable in amount, does not constitute a good defense, unless the transaction is tainted with fraud, or the sale was accompanied by a warranty or a misrepresentation.[2] Where, however, there is a failure of a distinct part of the consideration *either in quality or in quantity*, the courts hold that it constitutes a good defense in actions upon commercial paper.[3] The defense, arising from a failure of consideration, is waived by a settlement of the indebtedness, or by an execution of the contract with full knowledge of the defense.[4] The defense is also waived, where goods are sold on inspection, and the parties have agreed to abide by the selection.[5] And it has been held

[1] Exchange Bank *v.* Butner, 60 Ga. 654; McCord *v.* Crooker, 83 Ill. 556; Whitacre *v.* Culver, 9 Minn. 295; Key *v.* Knott, 9 Gill & J. 342. But see Leighton *v.* Grant, 20 Minn. 345, where it was held that if two or more notes are given in settlement of an account for a larger sum than what a proper accounting would indicate, the partial failure of consideration would not be a good defense to any one of the notes, not even against the original payee.

[2] Tye *v.* Gwynne, 2 Campb. 346; Laing *v.* Fidgeon, 6 Taunt. 108; *s. c.* 4 Campb. 169; Morgan *v.* Richardson, 7 East, 482, *n.*; Obbard *v.* Betham, Mood. & M. 483; Tricky *v.* Lame, 6 M. & W. 278; Warwick *v.* Nairn, 10 Exch. 762; Gray *v.* Cox, 4 B. & C. 108; Jones *v.* Bright, 5 Bing 535; O'Neill *v.* Bacon, 1 Houst. 215; Allen *v.* Furbish, 4 Gray, 504; Nichols *v.* Hunton, 45 N. H. 470; Richardson *v.* Sanborn, 33 Vt. 75; Beninger *v.* Corwin, 4 Zab. 257. But see Wyckoff *v.* Runyon, 4 Vroom, 107.

[3] Earl *v.* Page, 6 N. H. 477; Bethel *v.* Franklin, 57 Mo. 466; Hammett *v.* Barnard, 1 Hun, 198. For failure in quality, see Agra, etc. Bank *v.* Leighton, L. R. 2 Exch. 56; Gauldin *v.* Shehee, 20 Ga. 531; Hamilton *v.* Conyers, 28 Ga. 276; Marlow *v.* Kink, 17 Tex. 177. But see Lough *v.* Bragg, 18 Minn. 121, where it is held that there is no failure of consideration, because the grantee erroneously supposed the contract of sale included a lot of land not intended to be conveyed, unless the contract is rescinded. See also, to the same effect, Morgan *v.* Richardson, 7 East, 482.

[4] Matthews *v.* Smith, 67 N. C. 374.

[5] Wiggins *v.* Cleghorn, 61 Ga. 364.

that the failure of consideration never constitutes a defense to an action on commercial paper, unless the value was warranted expressly or by implication.[1] Fraudulent representations, however, have the same effect as a breach of warranty, in making the failure of consideration a good defense.[2] On the other hand, a failure of consideration, occurring through a mistake of fact, does not constitute a good defense to an action on commercial paper, although the mistake may be remedied by an action in equity, asking for a reformation of the instrument.[3]

§ 204. **Failure by non-performance of agreement.** — Where the consideration is the performance of an agreement, its non-performance constitutes in whole or in part a failure of consideration, and operates as a good defense to a commercial obligation founded on it.[4] But mere delay

[1] Welsh *v.* Carter, 1 Wend. 185; Rudderow *v.* Huntington, 3 Sandf. 252; Reed *v.* Prentiss, 1 N. H. 174; Bryant *v.* Pember, 45 Vt. 487; Buhrman *v.* Baylis, 14 Hun, 608; Mattock *v.* Gibson, 8 Rich. 437; Terry *v.* Hickman, 1 Mo. App. 119; Detrick *v.* McGlone, 46 Ind. 291; Richards *v.* Betzer, 53 Ill. 466. See Dickinson *v.* Hall, 14 Pick. 217; Johnson *v.* McCabe, 37 Ind. 535; Aldrich *v.* Stockwell, 9 Allen, 45; Beers *v.* Williams, 16 Ill. 69; Atkins *v.* Cobb, 56 Ga. 86; Parrot *v.* Farnsworth, Brayt. 174; Thompson *v.* Wheeler Mfg. Co., 29 Kan. 476; Rumsey *v.* Sargent, 21 N. H. 399; Shepherd *v.* Temple, 3 N. H. 455; Davis *v.* McVickers, 11 Ill. 327; Edwards *v.* Pyle, 23 Ill. 354; Manny *v.* Glendinning, 15 Wis. 59; Hiner *v.* Newton, 30 Wis. 640.

[2] Mills *v.* Oddy, 2 C. M. & R. 103; Becker *v.* Vroomlan, 13 Johns. 302; Beall *v.* Brown, 12 Md. 550; Jones *v.* Hathaway, 77 Ind. 14; Whitney *v.* Allaire, 4 Den. 554; Elsass *v.* Moore's Hill, etc., Institute, 77 Ind. 72; Franklin *v.* Lang, 7 Gill & J. 419; Hodges *v.* Torrey, 28 Mo. 99; Spalding *v.* Vandercook, 2 Wend. 432; Groff *v.* Hansel, 33 Md. 161; Harrington *v.* Leo, 33 Vt. 249; Southall *v.* Rigg, 11 C. B. 481.

[3] Carpentier *v.* Minturn, 6 Lans. 56; Haynes *v.* Thorn, 28 N. H. 386; Rogers *v.* Rogers, 1 Hall, 391; Maddy *v.* Sulphur Springs Tpk. Co., 57 Ind. 148; Wadleigh *v.* Develling, 1 Bradw. 596.

[4] Watson *v.* Russell, 3 B. & S. 34; Miller *v.* Wood, 23 Ark. 546; Powell *v.* Subers, 67 Ga. 448; Kelly *v.* Webb, 27 Tex. 368; Barnes *v.* Stevens, 62 Ind. 226; Jeffries *v.* Lamb, 73 Ind. 202; Corwith *v.* Colter, 82 Ill. 585; Mitchell *v.* Stinson, 80 Ind. 324; Booth *v.* Fitzer, 82 Ind. 66;

in the performance will not amount to failure, except, perhaps, as a partial failure, when the time of performance is of the essence of the contract.[1] And where no time is specified, and the character of the contract will permit its performance at any time, it has been held that there is no complete failure of consideration as long as the contract is not rescinded.[2]

In order that the non-performance of the agreement may constitute a failure of consideration of the commercial paper, the agreement must not be collateral and remotely connected with the paper. In such a case, the agreement cannot properly be considered a part of the consideration; and its non-performance, therefore, cannot affect the liabilities of the parties to the paper.[3]

Dickens *v.* Morgan, 54 Iowa, 684; Little *v.* Thurston, 58 Me. 86; Tillotson *v.* Grapes, 4 N. H. 444; Hawks *v.* Truesdale, 12 Allen, 564; Lawrence *v.* Griswold, 30 Mich. 410; Andrews *v.* Woodcock, 14 Iowa, 397; Tift *v.* Phœnix Ins. Co., 6 Lans. 198; Stanford *v.* Davis, 54 Ind. 45; Hope Iron Works *v.* Holden, 58 Me. 146; Miller *v.* Ritz, 3 E. D. Smith, 253; Bookstaver *v.* Jayne, 60 N. Y. 145; Dubois *v.* Baker, 40 Barb. 556; Hill *v.* Endes, 19 Ill. 163; Kirkman *v.* Boston, 67 Ill. 599; Hall *v.* Henderson, 84 Ill. 611; Compton *v.* Jones, 65 Ind. 117; Pope *v.* Hayes, 19 Tex. 170; Scotten *v.* Randolph, 96 Ind. 581; Doughty *v.* Savage, 28 Conn. 146; McSherry *v.* Brooks, 46 Md. 103; Pearson *v.* Cummings, 28 Iowa, 344.

[1] Bourland *v.* Gibson, 91 Ill. 470; Burr *v.* Wilson, 26 Ind. 389.

[2] 1 Parsons, 203, 204. See Spiller *v.* Westlake, 2 B. & Ad. 155; Freligh *v.* Platt, 5 Cow. 494; Read *v.* Cummings, 2 Greenl. 82; Chapman *v.* Eddy, 13 Vt. 205; Wade *v.* Killough, 3 Stew. & P. 431; George *v.* Stockton, 1 Ala. 136.

[3] See Bacon *v.* Porter, 1 Root, 370; Bacon *v.* Pettibone, 2 Root, 284; Crawford *v.* Robie, 42 N. H. 162; Spiller *v.* Westlake, 2 B. & Ad. 155; Moggridge *v.* Jones, 14 East, 486; *s. c.* 3 Campb. 38; Grant *v.* Welchman, 16 East, 207; Maun *v.* Lent, 10 B. & C. 877; Stanton *v.* Maynard, 7 Allen, 335; Clough *v.* Baker, 48 N. H. 254; Henshaw *v.* Dutton, 59 Mo. 139; Plumb *v.* Niles, 34 Vt. 230; Hodgkins *v.* Moulton, 100 Mass. 309; Travers *v.* Stevens, 11 Cush. 167; Waterhouse *v.* Kendall, 11 Cush. 128; Pitkin *v.* Frink, 8 Met. 12; Adams *v.* Wilson, 12 Met. 138; Cook *v.* Wolfendale, 105 Mass. 401; Arbuckle *v.* Hawks, 20 Vt. 538; Stewart *v.* Anderson, 59 Ind. 375; Lester *v.* Fowler, 43 Ga. 190; Mountjoy *v.* Mullikin, 16 Ind. 226; Howe Machine Co. *v.* Reber, 66 Ind. 408; Miller *v.* Howell,

§ 205. **Failure of consideration after its delivery.** — Where the transfer of goods is the consideration, and the goods have been delivered, their subsequent dispossession, destruction or diminution in value, whether it results from some inherent defect or from some external cause, will not be considered such a failure of consideration as will avoid the commercial paper given for the purchase-money,[1] unless there be a warranty against such a failure, either express or implied from a representation that such a failure need not be anticipated.

2 Ill. 499; Mechanics' Bank *v.* Frazer, 86 Ill. 133; Douglass *v.* Eason, 36 Ala. 687; Headley *v.* Good, 24 Tex. 232.

[1] Stephens *v.* Wilkinson, 2 B. & Ad. 320; Lomas *v.* Bradshaw, 9 C. B. 620; Jones *v.* Jones, 6 M. & W. 84; Smock *v.* Pierson, 68 Ind. 405; Blackman *v.* Dowling, 63 Ala. 304; Dowling *v.* Blackman, 70 Ala. 303; Winslow *v.* Wood, 70 N. C. 405; Britton *v.* Clark, 16 Ohio, 297; Brooks *v.* Cutter, 119 Mass. 132; Kerchner *v.* Gettys, 18 S. C. 521; Loring *v.* Otis, 7 Gray, 563; Crow *v.* Eichinger, 34 Ind. 65; Cook *v.* Whitfield, 41 Miss. 541; Diamond *v.* Harris, 33 Tex. 634; Lively *v.* Robbins, 39 Ala. 461; Clark *v.* Smith, 21 Minn. 539; Koch *v.* Levy, 38 Mo. 147; Merrill *v.* Gamble, 46 Iowa, 615; Matthews *v.* Dunbar, 3 W. Va. 138; Dowdy *v.* McLellan, 52 Ga. 408.

CHAPTER XI.

THE ACCEPTANCE OF BILLS OF EXCHANGE AND CERTIFICATION OF OTHER COMMERCIAL PAPER.

SECTION 209. The object and effect of acceptance.
210. The effect of failure to accept.
211. What bills must be presented for acceptance.
212. Presentment by whom and to whom.
213. Presentment, at what place.
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215. Presentment, — within what time.
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220. At what time acceptances may be made.
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222. Acceptances, verbal and written.
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227. Conditional and qualified acceptances.
228. Acceptances for honor or *supra* protest.
229. Protest for better security.
230. What acceptance admits.
231. The admissions of acceptor for honor.
232. How acceptor's liability may be waived.
233. Certified notes.
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§ 209. **The object and effect of acceptance.** — Merely drawing a bill of exchange does not impose upon the drawee any obligation to pay the bill. Until he has agreed, by his acceptance or by a previous contract to pay it, he is under no obligation to do so; and it is held, as a general rule, that the payee or holder cannot sue the drawee

before acceptance, even though the drawee has sufficient funds of the drawer in his hands to cover the amount of the bill.[1] The only exception to this rule is where the bill of exchange is held to operate as an assignment of the funds against which it is drawn. This question has been fully discussed, and the authorities cited, in a previous connection,[2] and needs no extensive reference here. It is sufficient to say here, that if the bill is drawn for the whole amount of the deposit, it does operate as an equitable assignment of the fund, and will bind the drawee after notice.[3]

Until the bill is accepted, the drawee is to such a degree considered a stranger to the instrument, that he can discount it and have it indorsed to him, and again transfer it by indorsement to another, without assuming by implication the obligation of an acceptor.[4]

The acceptance of a bill means the agreement of the drawee to pay the full amount of the bill according to its tenor. Before acceptance, the drawer is the primary debtor; but afterwards, the acceptor becomes the primary debtor, and the drawer remains only secondarily liable on an implied guaranty that the acceptor will pay.[5] The ac-

[1] Mandeville *v.* Welch, 5 Wheat. 277; Schimmelpennich *v.* Bayard, 1 Pet. 264; Tiernan *v.* Jackson, 5 Pet. 580; Luff *v.* Pope, 5 Hill, 413; 7 Hill, 577; Harris *v.* Comstock, 3 Comst. 93; New York, etc., Bank *v.* Gibson, 5 Duer, 574; Wharton *v.* Walker, 4 B. & C. 163; De Liquero *v.* Munson, 11 Heisk. 15; Bailey *v.* South-Western Bank, 11 Fla. 266; Carr *v.* Nat. Security Bank, 107 Mass. 45; Tyler *v.* Gould, 48 N. Y. 682; Bullard *v.* Randall, 1 Gray, 605; Butterworth *v.* Peck, 5 Bosw. 341; Chapman *v.* White, 6 N. Y. 412; Dykers *v.* Leather Mfrs. Bank, 11 Paige, 612.

[2] See *ante*, § 5 *et seq.*

[3] Mandeville *v.* Welch, 5 Wheat. 277; Gibson *v.* Cooke, 20 Pick. 15; Anderson *v.* De Soer, 6 Gratt. 364.

[4] Attenborough *v.* McKenzie, 36 Eng. L. & Eq. 562; Desha *v.* Stewart, 6 Ala. 852; Swope *v.* Ross, 40 Pa. St. 186.

[5] Russell *v.* Phillips, 14 Q. B. (68 E. C. L. R.) 891; Cox *v.* National Bank, 100 U. S. 712; Jarvis *v.* Wilson, 46 Conn. 90; Hoffman *v.* Milwaukee Bank, 12 Wall. 181; Hamilton *v.* Catchings, 58 Miss. 92.

ceptor either satisfies himself out of funds of the drawer which he has in his possession; or he may recover of the drawer the amount which he pays on the bill. But in no case can he bring an action against the drawer, or charge the amount of the bill in the account of the drawer, before he actually pays the bill, and thus discharges the drawer from all responsibility.[1]

The drawee, by his acceptance, becomes bound by all the terms and conditions of the bill, and agrees to pay the bill according to the tenor.[2]

§ 210. **The effect of failure to present for acceptance.** — Whenever it is the duty of the holder of a bill to present it to the drawee for acceptance, and he fails to do so in the proper manner and time, he not only will lose his remedy on the bill, but also every claim against the drawer, the indorsers and all other parties liable on the bill or in the transaction in settlement of which the bill was issued.[3] The holder owes this duty to those who have become liable on the bill, because they have incurred the liability in expectation of their being protected by the acceptance and payment of the bill by the drawee. If acceptance is refused, the bill becomes dishonored at once, and should be then protested, if the bill be of the kind which requires protest; and in all cases of refusal to accept, notice should be given

[1] Bracton *v.* Willing, 4 Call, 288; Planters' Bank *v.* Douglass, 2 Head, 699.

[2] Smith *v.* Muncie Nat. Bank, 29 Ind. 158.

[3] Camidge *v.* Allenby, 6 B. & C. 373; Darrach *v.* Savage, 1 Show. 155; Smith *v.* Miller, 43 N. Y. 171; 52 N. Y. 546; Adams *v.* Darby, 28 Mo. 182. In Gracie *v.* Sandford, 9 Ark. 238, Scott, J., said: "In case a plaintiff has lost by his own laches his legal recourse against the defendant upon the bill or note, it is in vain that he brings it into court and offers to cancel it, with the expectation of being allowed, after cancellation, to proceed to recover the original consideration. As well might he hope, by such means, to revive a cause of action that had been barred by the statute of limitations." See also Adams *v.* Boyd, 33 Ark. 33.

immediately to all the parties liable on the bill, and suit may be brought at once against them.[1] A State statute, which prohibits suit on such a bill until maturity, will not be binding on the United States courts, since such a statute would be contradictory of the general law of commercial paper. It has been held to be the duty of the United States courts to disregard the statute altogether.[2]

It has been held that presentment for acceptance, is necessary, in order to hold the drawer and indorsers, even when the drawer has requested the drawee not to accept it ;[3] and that the only cases, in which presentment may be dispensed with, are those in which there is collusion between the drawer and drawee in fraud of the holder.[4]

§ 211. **What bills must be presented for acceptance.** — Bills, which are payable on a certain day in the future, or a certain time after date, or on demand, need not be formally presented for acceptance. They need not be presented at all, until they mature, when they should be presented for payment.[5] But while it is not necessary, it

[1] Goodall *v.* Dolley, 1 T. R. 712; Bank of Washington *v.* Triplett, 1 Pet. 25; Townsley *v.* Sumrall, 2 Pet. 170; Landrum *v.* Trowbri e, 2 Met. 181; Pilkinton *v.* Woods, 10 Ind. 432; Smith *v.* Roach, 7 B. Mon. 17; Kinney *v.* Heald, 17 Ark. 397; Lucas *v.* Ladew, 28 Mo. 342.

[2] Watson *v.* Tarpley, 18 How. 517.

[3] Hill *v.* Heap, Dow & R. N. P. 57.

[4] Smith's Mercantile Law, 304; Bank of Washington *v.* Triplett, 1 Pet. 25.

[5] Bank of Washington *v.* Triplett,1 Pet. 25; Townsley *v.* Sumrall, 2 Pet. 170; Batchellor *v.* Priest, 12 Pick. 399; Bank of Bennington *v.* Raymond, 12 Vt. 401; Allen *v.* Suydam, 20 Wend. 321; Plato *v.* Reynolds, 27 N. Y. 586; House *v.* Adams, 48 Pa. St. 261; Orr *v.* Maginnis, 7 East, 362; Crosby *v.* Morton, 13 La. 357; Dunn *v.* O'Keefe, 5 M. & S. 282; Smith *v.* Roach, 7 B. Mon. 17; Walker *v.* Stetson, 19 Ohio St. 400; Carmichael *v.* Bank of Pennsylvania, 4 How. (Miss.) 567; Glasgow *v.* Copeland, 8 Mo. 268; Richardson *v.* Daniels, 5 U. C. Q. B. 671. In Philpott *v.* Bryant, 3 C. & P. 244. Park, J., said: "I should destroy half the trade of the city of London, if I were to hold that bills made payable so many

is advisable to present all such bills for acceptance within a reasonable time after they are negotiated, in order that it may be known at an early date whether they will be honored. And if acceptance is refused, the refusal will be as much of a dishonor of the bill as if presentment for acceptance had been necessary as well as permissible; and the holder must protest and give the same notice, as is required in the other cases.[1]

When bills are payable at sight or so many days after sight or after demand, or after any other uncertain event — wherever the presentment for acceptance is necessary to fix the day of maturity in order to hold the drawer, indorsers, and all other parties to the bill, — they must be presented for acceptance without unreasonable delay.[2]

§ 212. **Presentment by whom and to whom.** — Presentment should be made by the rightful holder, or by his lawfully authorized agent. Possession is presumptive evidence of title, and sufficient to enable the holder to make a good presentment;[3] and if it should happen that the presentment was not made by the rightful owner, it would not affect the value of the presentment. The acceptance or protest and notice, in consequence of refusal to accept, as the

days after date must be presented for acceptance." But see Burnett *v.* Tidmarsh, 5 Bradw. 341.

[1] United States *v.* Barker, 4 Wash. C. C. 464; Landrum *v.* Trowbridge, 2 Met. 281; Allen *v.* Suydam, 20 Wend. 321; Glasgow *v.* Copeland, 8 Mo. 268.

Cox *v.* National Bank, 100 U. S. 704; Mitchell *v.* Degrand, 1 Mason, 176; Wallace *v.* Agry, 4 Mason, 336; 5 Mason, 118; Mielman *v.* D'Eguino, 2 H. Bl. 505; Robinson *v.* Ames, 20 Johns. 146; Allen *v.* Suydam, 20 Wend. 321; *s. c.* 17 Wend. 368; Aymar *v.* Beers, 7 Cow. 705; Fernandez *v.* Lewis, 1 McCord, 321; Craig *v.* Price, 23 Ark. 633; Dumont *v.* Pope, 7 Blackf. 367; Elting *v.* Brinkerhoff, 2 Hall, 459; Holmes *v.* Kerrison, 2 Taunt. 323; Mullick *v.* Radakissen, 9 Moore P. C. 46; Dixon *v.* Mutall, 1 C. M. & R. 307; Thorpe *v.* Booth, R. & M. 389.

[3] Freeman *v.* Boynton, 7 Mass. 483; Bank of Utica *v.* Smith, 18 Johns. 230; Agnew *v.* Bank of Gettysburg, 2 Har. & Gill. 478.

case might be, would inure to the benefit of the rightful holder.[1]

Where presentment is made by an agent, it must be done during the life-time of the principal. The death of the principal revokes the authority in this case, as in any other.[2] In some of the States it is provided by statute that the notary public shall have the power to make presentment to all persons concerned.[3]

The presentment must of course be made to the drawee or to some one who is authorized to act for him. If a bill is drawn upon a firm, it need not be presented to more than one member of the firm, as his acceptance or refusal binds the firm.[4] But if the drawees are not partners, the bill must be presented to all, in order to bind all.[5] The holder is not obliged to take the acceptance of one alone, and if he does, it would be at his own risk, unless the bill was protested for the failure to procure the other acceptance.[6] In some of the States it is provided by statute that if one of two or more joint drawees refuses to accept, the holder need not present the bill to the others, but may at once protest it as to all the drawees.[7]

If the drawee cannot be found and it becomes necessary to present the bill to an agent, the holder must be careful

[1] Chitty on Bills, 311; 1 Daniel, § 455.

[2] Gale *v.* Tappan, 12 N. H. 145.

[3] Such a statute is to be found in Maine, Michigan, West Virginia, Wisconsin, Wyoming. And in other States it is held that the presentment may be made by the notary's clerk. Schuchardt *v.* Hall, 36 Md. 59; Lee *v.* Bedford, 4 Met. (Ky.) 7.

[4] Greatlake *v.* Brown, 2 Cranch C. C. 541; Holtz *v.* Bopple, 37 N. Y. 634; Gates *v.* Beecher, 60 N. Y. 523; Pleasant Branch Bank *v.* McLaran, 36 Iowa, 306.

[5] Union Bank *v.* Willis, 8 Met. 504; Willis *v.* Green, 5 Hill, 232; Gates *v.* Beecher, 60 N. Y. 523; Arnold *v.* Dresser, 8 Allen, 435.

[6] See Story on Bills, § 229; Harris *v.* Clark, 10 Ohio, 5; Greenough *v.* Smead, 3 Ohio St. 415.

[7] In California, Dakota, and Utah.

that he selects an agent who is authorized to accept for the drawee. An acceptance by an unauthorized agent does not bind the drawee.[1] In some of the States, it is provided by statute that in the absence of the drawee, presentment may be made to any one having charge of the place of business or residence of the drawee.[2]

It is claimed by several of the authorities that if the drawee be dead, the holder must present the bill to his personal representatives for acceptance before protesting it for non-acceptance.[3] But, in consequence of the fact that any acceptance by a personal representative, in his representative capacity, must be conditional upon his possession of funds of the deceased drawee, it is held by other authorities, with much show of reason, that the holder is not obliged to present the bill to the personal representatives, but he may protest the bill at once and look to the drawer and indorsers.[4] Where a bill is drawn on a firm, and one

[1] Cheek *v.* Roper, 5 Esp. 175. And it is incumbent on the plaintiff to prove that the agent was authorized to accept or refuse acceptance. Nelson *v.* Fotterall, 7 Leigh, 180; Stainback *v.* Bank of Va., 11 Gratt. 260.

[2] See California, Dakota and Utah.

[3] "If on presentment it appear that the drawee is dead, the holder should inquire after his personal representative, and, if he live within a reasonable distance, should present the bill to him." Chitty on Bills (13th Am. ed.), [*280] 318; Story on Bills, § 236.

[4] "Upon principle it is not easy to see upon what ground the holder is bound to present a bill drawn upon the deceased to his executor or administrator for acceptance. An acceptance by the representative, binding himself personally, is not according to the tenor of the bill; neither is an acceptance qualified so as to render him responsible to pay out of the assets that may come into his hands." Edwards on Bills, 401. In Thompson on Bills, p. 282, "it has been said that if the drawee is dead the holder should present it to his nearest heirs, and protest it on their refusal to accept, though they have not yet taken up his succession. This should certainly be done where the drawee's heirs have taken up the succession. But otherwise, there is no person representing him, as to the bill, and the presentment of it then appears as futile as if made to a stranger. In such a case, it seems necessary that a holder should, within a reasonable time, notify to the other parties the drawee's death, by which presentment has become impossible."

of the partners is dead, and the partnership dissolved in consequence, the presentment for acceptance should be made to the surviving partner or partners.[1]

§ 213. **Presentment — At what place.** — In all cases, the bill should be presented at the drawee's domicile, it matters not where it is made payable.[2] It may be presented for acceptance either at the drawee's residence or place of business, according to the convenience of the holder, and this rule is recognized, even where the place of business is in one place and the residence is another.[3] But this would seem to be a very unreasonable rule, particularly in the light of the further requirement that the presentment should be made during business hours.[4] If a man has a place of business he may be expected to be there during business hours, and it is not reasonable for a holder to take the bill to his residence. If, as a fact, the drawee is found at his residence it will be a good presentment, as it will be wherever the drawee is found. But if the drawee is not found at his residence, it could not be a good presentment, since the holder as a rational man must know that the drawee can be found at his place of business. The fact that there are no cases cited to the point confirms me in my opinion that the practice of the commercial world is against the correctness of this rule. No one, at all acquainted with the customs of commercial intercourse, ever takes a bill for acceptance to the drawee's residence, unless he learns of his absence from his place of business or unless the drawee has no place of business.

If the drawee has changed his residence or place of busi-

[1] See Cayuga County Bank *v.* Hunt, 2 Hill, 635.

[2] Chitty on Bills, 316; 1 Daniel's Negot. Inst., § 460; Mason *v.* Franklin, 3 Johns. 202; Boot *v.* Franklin, 3 Johns. 207.

[3] Story on Bills, § 236; Chitty, 316; 1 Daniel, § 461.

[4] See *post*, § 214.

ness, the holder must exercise due diligence in searching for the drawee's new abode; and when he discovers it, the bill should be presented there.[1] If the drawee's residence or place of business cannot be ascertained after diligent inquiry, then the bill may be treated as dishonored, and protested for non-acceptance.[2] What is due diligence is a question of fact for the jury.[3]

§ 214. **Time of day for presentment — Business hours.** — If a bill is to be presented at the drawee's place of business, it should be presented during the customary hours of business. What are business hours will depend upon the custom of the place and of each particular business.[4] It does not matter at what hour the presentment is made, if the drawee or his authorized agent is found, and a reply made by him to the presentment. But the bill cannot be protested on a presentment at an unreasonable hour, if the right person is not found, to whom

[1] Bateman *v.* Joseph, 12 East, 433; Freeman *v.* Boyton, 7 Mass. 483; Anderson *v.* Drake, 44 Johns. 114; Collins *v.* Butler, 2 Stra. 1087; Browning *v.* Kinear, 1 Gow. 81; Beveridge *v.* Burgis, 3 Campb. 262; Hine *v.* Alley, 4 B. & Ad. 624.

[2] Chitty on Bills, 317; 1 Daniel's Neg. Inst. 429; Anon., 1 Ld. Raym. 743; Union Bank *v.* Fowlkes, 2 Sneed, 555; Ratcliff *v.* Planters' Bank, 2 Sneed, 425; Wolfe *v.* Jewett, 10 La. 383. So also may one treat the bill as dishonored, if the ascertained place of residence or business is closed and no one can be found to accept. Hine *v.* Alley, 4 B. & Ad. 624; 1 N. & M. 433.

[3] Collins *v.* Butler, 2 Stra. 1087; Bateman *v.* Joseph, 12 East, 433: Smith *v.* Bank of New South Wales, L. R. 41; L. J. P. C. 26. It is sufficient diligence if the bill is presented at the drawee's last place of residence, and is informed by one occupying it, or in possession, that the drawee had moved. Buckstone *v.* Jones, 1 Scott N. R. 19. But if there is an agent at the place, who is authorized to accept bills for the drawee, it should be presented to the agent. Phillips *v.* Astling, 2 Taunt. 206.

[4] Chitty on Bills, 316; 1 Daniel's Negot. Inst., § 464*a*; Parsons' N. & B. 346; Elford *v.* Teel, 1 M. & S. 28; 6 M. & S. 44; Parker *v.* Gordon, 7 East, 385; *s. c.* 6 Esp. 41; Leftley *v.* Bailey, 4 T. R. 170; Nelson *v.* Fotterall, 7 Leigh, 179; Cayuga Co. Bank *v.* Hunt, 2 Hill, 635.

presentment can be made.[1] If the bill is to be presented at the drawee's residence, any hour before the customary time of retiring will be sufficient.[2]

§ 215. **Presentment — Within what time.** — If the bill is payable on demand, at a fixed period after date, or on a certain day named, as we have seen already[3] there is no need of presentment for acceptance, in order to hold the drawer and indorsers, before the day of payment; when the presentment for acceptance merges into the presentment for payment.[4] But this rule is subject to two exceptions, viz.: when the drawer expressly provides for an immediate presentment for acceptance, and in any case where such a bill is given to an agent to be presented for acceptance. Although the principal who holds the bill is not obliged to present it for acceptance before maturity, the authorities curiously hold that if it is given to an agent to present, he is liable in damages to the holder, if he does not present it immediately or within a reasonable time.[5] But this view is combated by Prof. Parsons, and it does seem, notwithstanding the weight of authority is to the contrary, that there can be no reason for requiring an agent to present such a bill sooner than the law of commercial paper requires the principal to present it, unless the holder instructed his agent to present it immediately.[6] Perhaps the only

[1] Story on Bills, § 237; Chitty on Bills, 318; Garrett *v.* Woodcock, 1 Stark. 475; 6 M. & S. 44; Henry *v.* Lee, 2 Chit. 124. There are statutes to this effect in California, Dakota and Utah.

[2] See Dana *v.* Sawyer, 22 Me. 244.

[3] See *ante*, § 211.

[4] Goupy *v.* Harden, 7 Taunt. 159; Townsley *v.* Sumrall, 2 Pet. 178; Bachellor *v.* Priest, 12 Pick. 399; Allen *v.* Suydam, 17 Wend. 368; 20 Wend. 321.

[5] Allen *v.* Suydam, 17 Wend. 368; *s. c.* 20 Wend. 321; Van Wart *v.* Wooley, 3 B. & C. 439; 5 Dow. & R. 374; Bank of Scotland *v.* Hamilton, 1 Bell's Commentaries, 409; Thompson on Bills, 277.

[6] In referring to the case of Allen *v.* Suydam, 17 Wend. 368; 20

plausible reason that may be given in support of this ruling of the authorities, is that since it is more or less customary, although not necessary, for holders of bills payable at a certain time after date to present them for acceptance within a reasonable time, an agent may be said to have implied instructions to present for acceptance within a reasonable time all bills which are intrusted to him.

If the bills are payable at sight, or so many days after sight or after demand, then the presentment for acceptance is needed in order to determine the day of payment, and must therefore be made immediately or within a reasonable time.[1] And if the bill is not presented within a reasonable

Wend. 321, Prof. Parsons says (1 Parsons 346, n.): "The justice of this case, at least, is very doubtful. It will be seen that the bill, being payable at a certain time after date, need not have been presented for acceptance by the holder at all, but the agent presented it nine days before maturity, after having kept it in his hands seventeen days. He had no instructions from the principal to present it immediately, and it is very difficult to see why the agent was required to do more than the principal was bound to do. It also appeared in the case, that the lateness of presentment had nothing whatever to do with the refusal, and that, if the agent had presented the very day he received it, it would not have been accepted, nor was there any time between the date of the bill and its maturity when the drawees would have accepted; why then must an agent be required to make an utterly useless presentment, when any holder, in the exercise of reasonable diligence, would not be required to present, even if there was a fair prospect of acceptance? The reasons given are not satisfactory. The opinions of various writers are cited and the reasons, so far as they can be collected, are that the holder has an interest in having the bill accepted as soon as possible, and therefore his agent is bound to present immediately."

[1] Mullick *v.* Radakissen, 9 Moore P. C. 66; 28 Eng. L. & Eq. 86; Wallace *v.* Agry, 4 Mason, 336; Bridgeport Bank *v.* Dyer, 19 Conn. 136; Chambers *v.* Hill, 26 Tex. 472; English *v.* Board of Trustees, 6 Ind. 437; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; Bolton *v.* Harrod, 9 Mart. 326; Richardson *v.* Fenner, 10 La. Ann. 599; Field *v.* Nickerson, 13 Mass. 131; Prescott Bank *v.* Caverly, 7 Gray, 217; Muilman *v.* D'Eguino, 2 H. Bl. 569; Straker *v.* Graham, 4 M. & W. 721; Fry *v.* Hill, 7 Taunt. 397; Aymar *v.* Beers, 7 Cow. 705; Robinson *v.* Ames, 20 Johns. 146; Gowan *v.* Johnson,

time, the drawer and indorsers are discharged, although there may be no actual damage resulting from the delay.[1]

§ 216. **What is a reasonable time for presentment.** — It is difficult to lay down any general rule whereby to determine what is a reasonable time in which to make presentment, for each case must be settled on its own facts. The only rule that can be given is, that the holder is required to present the bill for acceptance with what will be, in the light of the circumstances of the case in question, due diligence.[2] When the facts are plain and simple, it may be said that what is a reasonable time is a question of law for the court; but that it is a question of fact for the jury, whenever the case is complicated by circumstances which render the question doubtful.[3]

20 Johns. 176; Fernandez *v.* Lewis, 1 McCord, 321; Jordan *v.* Wheeler, 20 Tex. 698; Nichols *v.* Blackmore, 27 Tex. 586; Knott *v.* Venable, 42 Ala. 186.

[1] Mullick *v.* Radakissen, 9 Moore P. C. 66; 28 Eng. L. & Eq. 86; Carter *v.* Flower, 16 M. & W. 743.

[2] Goupy *v.* Harden, 7 Taunt. 159. It is not necessary that the holder make use of the first opportunity to present it. Muilman *v.* D'Eguino, 2 H. Bl. 565; Prescott Bank *v.* Caverly, 7 Gray, 217.

[3] "Ordinarily, the question whether a presentment was within a reasonable time, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not." Bigelow, J., in Prescott Bank *v.* Caverly, 7 Gray, 217. See also to same effect 1 Parsons' N. & B. 340; Wallace *v.* Agry, 4 Mason, 336; Goupy *v.* Harden, 7 Taunt. 159; Fry *v.* Hill, 7 Taunt. 397; Muilman *v.* D'Eguino, 2 H. Bl. 565; Straker *v.* Graham, 4 M. & W. 721; Shutz *v.* Robins, 3 C. & P. 80; Mullick *v.* Radakissen, 28 Eng. L. & Eq. 86; Fernandez *v.* Lewis, 1 McCord, 322; Chambers *v.* Hill, 26 Tex. 472; Nichols *v.* Blackmore, 27 Tex. 586; Lockwood *v.* Crawford, 18 Conn. 361; Richardson *v.* Fenner, 10 La. Ann. 599; Mellish *v.* Rawdon, 9 Bing. 416; Knott *v.* Venable, 42 Ala. 186; Walsh *v.* Dart, 23 Wis. 334; Salisbury *v.* Renick, 44 Mo. 551; Mohawk Bank *v.*

The question of reasonable time may be affected by the facility of communication between the domiciles of the holder and the drawee. If there is regular communication at short intervals, and the distance is not great, it would take less delay to be unreasonable than if the communication was irregular, at long intervals, and the places were far apart.[1] So, also, the unsalability of exchange on the place of abode of the drawee is a controlling circumstance, justifying sometimes a long delay in presentment for acceptance.[2] Other circumstances, such as the delay in the transportation of the mail,[3] sickness,[4] war between the

Broderick, 10 Wend. 304; Aymar *v.* Beers, 7 Cow. 705; Vantrot *v.* McCulloch, 2 Hilt. 272; Muncy School Board *v.* Commonwealth, 84 Pa. St. 464. The Supreme Court of Michigan expressed itself as follows: "Where the law has adopted no rule as to time of presentment except that it should be in a reasonable time, as in the case of bills payable at sight, the court cannot, without overlooking objects for which such presentment and notice of non-payment are required, say as a matter of law that any delay is reasonable beyond that which may be fairly required in the ordinary course of business without special inconvenience to the holder, or by the special circumstances of the particular case." Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; 13 Mich. 191.

[1] Straker *v.* Graham, 5 M. & W. 721; Shute *v.* Robins, Moody & M. 133; 3 C. & P. 80; Mullick *v.* Radakissen, 9 Moore C. P. 66; 28 Eng. L. & Eq. 86; Dumont *v.* Pope, 7 Blackf. 367; Nichols *v.* Blackmore, 27 Tex. 586.

[2] In Mullick *v.* Radakissen, 9 Moore P. C. 66; 28 Eng. L. & Eq. 86, a bill drawn in Calcutta on Hong Kong at sixty days was kept by an indorsee for five months. In pronouncing the delay to be reasonable under the circumstances, Parke, B., said: "The evidence proved that, for the whole of the time, a period of more than five months, bills on China were altogether unsalable to Calcutta; that such was the regular and permanent state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had the right, with a view to his own interests, to keep the bill for some time, he had no such right where there was no hope of the amendment of that state of things." See also Mellish *v.* Rawdon, 9 Bing. 416; 2 Moore & S. 500; Wallace *v.* Agry, 4 Mason, 336.

[3] Walsh *v.* Blatchley, 6 Wis. 422. But see Walsh *v.* Dart, 23 Wis. 334. Sending the bill to the wrong place through the mistake of the holder is no excuse for delay. Schofield *v.* Bayard, 3 Wend. 488.

[4] Aymar *v.* Beers, 7 Cow. 705.

countries of the holder and the drawee,[1] and other circumstances beyond the control of the holder,[2] have been held to warrant delay in the presentment for acceptance.

It is not necessary for the bill to be sent directly to the drawee. Bills of exchange are intended to circulate as, and in the place of, currency; and as long as it is not sent to some place outside of the ordinary channels of commerce, it may be indorsed by one person to another, and sent from one place to another, before it is presented to the drawee for acceptance.[3] It is certain that if the holder

[1] United States *v.* Barker, 1 Paine C. C. 156.

[2] But see Barker *v.* Parker, 6 Pick. 80, where it was held that a severe rain is no excuse for delay in presentment. But I apprehend that if the storm was so violent as to render it dangerous to brave the elements, the courts would in these days of luxury declare it to be a sufficient reason for delay.

[3] In Wallace *v.* Agry, 4 Mason, 333, Story, J., said: "It has been said that the plaintiff was bound to send it (the bill), directly from Havana to England by some regular conveyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party who receives a negotiable bill payable after sight has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this as on other occasions. The holder of such a bill is not at liberty to send it to remote places, wholly out of the course of trade, if there be unreasonable delay thereby in the presentment for acceptance; and thus to fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that, by the course of trade, many bills of exchange drawn in Havana on England are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule to hold that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to this extent." "Bills, both inland and foreign, having the quality of negotiability, are intended, in some degree, to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe

retains possession of the bill without presentment for acceptance for as long a time as is consumed in its circulation from hand to hand, and from place to place, the delay will be held to be unreasonable, although it may be considered reasonable, if the bill had been circulated.[1] But the bill cannot circulate indefinitely without presentment to the drawee. The circulation of the bill only extends the time, which will be considered reasonable. Here again, we find the question of reasonable time dependent upon the customs of trade and the facts of each case. In the note below, the authorities are given with sufficient illustrations.[2]

and convenient mode of making payments of indebtedness between distant points. Banking houses that for a consideration issue such bills, must be understood to do so in accordance with the known custom of the country — that they will be put in circulation for a limited period. If this were not so, their value would be greatly depreciated, and their utility in commercial transactions would be destroyed." Scott, J., i Montelius *v.* Charles, 76 Ill. 305. See also Shute *v.* Robins, 3 C. & P. 80; Muilman *v.* D'Eguino, 2 H. Bl. 565; Mellish *v.* Rawdon, 9 Bing. 416; 2 M. & S. 570; Nichols *v.* Blackmore, 27 Tex. 586; Jordan *v.* Wheeler, 20 Tex. 698; Richardson *v.* Fenner, 10 La. Ann. 599; Bolton *v.* Harrod, 9 Mart. 326.

[1] See Muilman *v.* D'Eguino, 2 H. Bl. 565; Fry *v.* Hill, 7 Taunt. 397; Robinson *v.* Ames, 20 Johns. 146; Gowan *v.* Jackson, 20 Johns. 176.

[2] In the following cases, the delays were held to be reasonable: four days, drawn in country on London, Shute *v.* Robins, 3 C. & P. 80; bill drawn in Erie, N. Y., on New York City, delay eleven days; National Newark Bkg. Co. *v.* 2nd Nat. Bank, 63 Pa. St. 404; drawn in New Orleans on Liverpool, ten weeks, Bolton *v.* Harrod, 9 Mart. 326; drawn in Dakota on Chicago, thirty-five days, Montelius *v.* Charles, 76 Ill. 303; drawn in Toronto on New York, three months, Boyes *v.* Joseph, 7 U. C. Q. B. 505; drawn in West Indies on London, six months, Gowan *v.* Jackson, 20 Johns. 176; drawn in Island of Jersey on London, thirty-seven days, Godfrey *v.* Coulman, 13 Moore P. C. 11; drawn at Rio Janeiro on London, five months, Mellish *v.* Rawdon, 9 Bing. 416; drawn in London on Calcutta, seventy-eight days, Muilman *v.* D'Eguino, 2 H. Bl. 565; drawn in London on Lisbon, three months and ten days, Goupy *v.* Harden, 7 Taunt. 397; drawn in Augusta, Ga., on New York, two months and a half, Robinson *v.* Ames, 20 Johns. 176; drawn in Windsor on London, four days, Fry *v.* Hill, 7 Taunt. 397. On the other hand, it was held to be unreasonable delay of presentment for acceptance, where the bill was

§ 217. **Form and manner of presentment for acceptance.** — It is certainly necessary for the holder to have the bill in his potential, if not actual, possession, when he makes presentment for acceptance; and it is sometimes held that there is no presentment, unless the holder has the bill with him, and exhibits it to the drawee.[1] But it cannot be said that it is absolutely necessary to show the bill to the drawee, if he is satisfied with a verbal description of it, and gives an answer to the request for acceptance.[2] It is only necessary when the drawee insists upon the production of the bill. It is then necessary that it be handed to the drawee for his examination.[3] The drawee is entitled to a reasonable time, in which to examine into his accounts and deliberate over the question of accepting the bill. In order to enable him to make this examination, the customary law permits him to take the bill into his possession for twenty-four hours before giving his answer.[4] But if the

drawn in Detroit, on Chicago, twenty-one day's delay, Phœnix Ins. Co. *v.* Allen, 11 Mich. 30; Phœnix Ins. Co. *v.* Gray, 13 Mich. 191; drawn in Wisconsin on New York, fourteen days, Walsh *v.* Dart, 23 Wis. 334; drawn in Ohio on New York, ten days, Vantrot *v.* McCulloch, 2 Hilt. 272; drawn in Charleston, S. C., on New York, two months and a half, Fernandez *v.* Lewis, 1 McCord, 322; drawn and payable in same State, forty-seven days, Nichols *v.* Blackmore, 27 Tex. 586; same, thirty days, Dumont *v.* Pope, 7 Blackf. 367; drawn in St. Louis on Chicago, thirty days, Olshausen *v.* Lewis, 1 Biss. 419.

[1] "The term presentment imports not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn, that he may see the same, and examine his accounts or correspondence, and judge what he shall do; whether he shall accept the draft or not." Fall River Union Bank *v.* Willard, 5 Met. 216.

[2] Fisher *v.* Beckwith, 19 Vt. 31; Carmichael *v.* Bank of Pennsylvania, 4 How. (Miss.) 567. But see 1 Parsons' N. & B. 348.

[3] Fall River Union Bank *v.* Willard, 5 Met. 216; 1 Daniel, § 463.

[4] Bellasis *v.* Hester, 1 Ld. Raym. 280; Ingram *v.* Forster, 2 J. P. Smith, 242; Montgomery Co. Bank *v.* Albany City Bank, 8 Barb. 399; Overman *v.* Hoboken City Bank, 31 N. J. L. 563; Connelly *v.* McKean, 64 Pa. St. 113; Case *v.* Burt, 15 Mich. 82; 1 Parsons' N. & B. 348; 1

drawee refuses within the twenty-four hours, the bill should be protested immediately,[1] and if the drawee fails to give answer before the expiration of that time, the protest must be made as soon as it expires.[2] In many of the States, the time during which the bill may be detained by the drawee is regulated by statute, generally, in accordance with the customary rule, just stated.[3]

If the bill has two or more parts, either part may be presented, the original or the duplicate.[4] But the drawee must accept only one of the parts. If he should write his acceptance across the face of more than one part, and the accepted parts should pass into the hands of different *bona fide* holders, the acceptor could be held liable on all.[5]

In any case, the presentment must be absolute and unconditional. It will not be sufficient presentment if the notary in presenting it takes it away with the understanding that he is to return with it the next day.[6]

§ 218. **When acceptance may be dispensed with.** — If the drawee is directed in the bill, to pay it "without acceptance," or the bill contains a clause indicating a waiver

Daniel's Negot. Inst., § 492. It is however held that the time for deliberation will be limited to the next post, if that should leave before the expiration of the twenty-four hours. Bellasis *v.* Hester, 1 Ld. Raym. 280. But see *contra*, Morrison *v.* Buchanan, 6 C. & P. 18.

[1] 1 Parsons' N. & B. 348; 1 Daniel's Negot. Inst., § 492; Chitty on Bills, [*279] 317.

[2] Ingram *v.* Forster, 2 J. P. Smith, 242. See *post*, § 224, as to effect of detention of the bill implying acceptance.

[3] In Massachusets, Rhode Island, California, Alabama, Arizona, Arkansas, Idaho, District of Columbia, Kansas, Nevada, Missouri, New York, Washington Territory.

[4] Downes *v.* Church, 13 Pet. 205; Bank of Pittsburgh *v.* Neal, 22 How. 108; Walsh *v.* Blatchley, 6 Wis. 422; Perreira *v.* Jopp, 10 B. & C. 450.

[5] Bank of Pittsburgh *v.* Neal, 22 How. 96, 109.

[6] Case *v.* Burt, 15 Mich. 82. But see Andrews *v.* German Nat. Bank, 9 Heisk. 211, where it was held to be a good presentment, where a check was held back at the request of the drawer until a later hour in the day, three p. m.

of acceptance, there is no need of presenting the bill for acceptance, and the drawer has the same liability as on an accepted bill.[1] Acceptance may be dispensed with, whenever the drawee is incapable of making a valid contract, because he is under legal disabilities; for example, an idiot or insane person, a minor or a married woman;[2] in such cases the holder need not present the bill for acceptance, but may at once protest it, and proceed against the other parties for non-acceptance.[3] There is, also, no need of acceptance, when the drawer and drawee are the same persons; not only when they are the one natural person, or a partnership,[4] but, also, when they are different officers of the same private corporation.[5] But it is different with public or municipal corporations. It is held that the drafts or warrants of one municipal officer on another must be presented for acceptance in order to be protested.[6]

On the other hand, it has been held that presentment for acceptance cannot be dispensed with, because the drawer had countermanded the bill.[7] And it must be ob-

[1] Miller *v.* Thompson, 3 M. & G. (42 E. C. L. R.) 576; Rey *v.* Kinnear, 2 M. & R. 117; English *v.* Wall, 12 Rob. (La.) 132; Denegre *v.* Milne, 10 La. Ann. 324; Carson *v.* Russell, 26 Tex. 452; Liggett *v.* Weed, 7 Kan. 273; Webb *v.* Mears, 9 Wright, 222.

[2] See *ante*, chap. IV.

[3] 1 Daniel's Negot. Inst., § 484; Chitty on Bills [*192.] 221; Thompson on Bills, 92; Story on Bills, § 107. See Mellish *v.* Simeon, 2 H. Bl. 378; Tooting *v.* Hubbard, 3 Bos. & Pul. 291; California Code.

[4] Cunningham *v.* Wardwell, 3 Fairf. 466; Roach *v.* Ostler, 1 Man. & R. 120; Douglass *v.* Cowles, 5 Day, 511; Marion, etc., R. R. Co. *v.* Hodge, 9 Ind. 163; Miller *v.* Thompson, 3 M. & G. 576. But see Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15, where it is held that presentment is not dispensed with, where the drawer and drawee are the same person, but that there is no need of protest and notice.

[5] Hasey *v.* White Pigeon Company, 1 Dougl. (Mich.) 193; Dennio *v.* Table Mountain Water Co., 10 Cal. 369. See *ante*, § 128.

[6] See *ante*, § 138.

[7] Chitty on Bills, 311; 1 Daniel's Negot. Inst. § 450; 1 Parsons' N. & B. 338; Hill *v.* Heap, Dow. & R. 57; Prideaux *v.* Collier, 2 Stark. 57.

served that waiver of the notice of protest is not equivalent to a waiver of the acceptance.[1]

§ 219. **Who may accept.** — Except in cases of acceptance for honor, no one but the drawee named in the bill can accept it, and be bound as an acceptor. A stranger could not bind himself as an acceptor by accepting a bill which is not addressed to him.[2] But if the name of the drawee is left blank, the acceptance by an apparent stranger would be an acknowledgment that he was the intended drawee, and he would be bound by it.[3] And it has been held that if the bill be addressed to A., or in his absence to B., it will be a good bill of exchange, and the acceptance by either of them will be sufficient and binding.[4] But it has been held that if any one, not a drawee, signs a bill as an acceptor, he may, if his obligation rests upon a sufficient consideration, be bound thereby as a guarantor.[5]

[1] Drinkwater *v.* Tebbetts, 17 Me. 16; Burnham *v.* Webster, 17 Me. 50. In California, by the code, waiver of presentment includes waiver of notice of protest, but the waiver of protest only includes waiver of presentment in the case of foreign bills.

[2] Polhill *v.* Walter, 3 B. & Ad. (23 E. C. L. R.) 114; Lindus *v.* Bradwell, 5 C. B. 583; Jackson *v.* Hudson, 2 Camp. 447; Malcomson *v.* Malcomson, 1 L. R. Ireland, 228; Nichols *v.* Diamond, 9 Exch. 157; Davis *v.* Clark, 6 Q. B. (51 E. C. L. R.) 16; Jenkins *v.* Hutchinson, 13 Q. B. (66 E. C. L. R.) 744; May *v.* Kelly, 27 Ala. 497; Smith *v.* Lockridge, 8 Bush, 425; Keenan *v.* Nash, 8 Minn. 409.

[3] Gray *v.* Milner, 8 Taunt. 739; 3 J. B. Moore, 90; Peto *v.* Reynolds, 9 Exch. 410; Davis *v.* Clark, 6 Q. B. (51 E. C. L. R.) 16; Wheeler *v.* Webster, 1 E. D. Smith, 1; 1 Parsons' N. & B. 289.

[4] Anon., 12 Mod. 447; 1 Daniel's Negot. Inst., § 98; Story on Bills, § 58.

[5] Jackson *v.* Hudson, 2 Camp. 447; Chitty on Bills, 321; Story on Bills, § 254; and, at least as between the immediate parties, such a person may show by extraneous evidence in which character he intended to be bound. Curry *v.* Reynolds, 44 Ala. 349. But see Steele *v.* McKinlay, 43 L. J. R. 358, where it was held that such a person could not be bound as a guarantor, because there is no sufficient memorandum in writing to satisfy the requirements of the statute of frauds. See Malcomson *v.* Malcomson, 1 L. R. Ireland, 228.

It must, however, be remembered, that a person may lawfully have more than one name, and, consequently, a drawee, might be described in the bill by one name, and accept in another name. Parol evidence is admissible to prove that the two names describe one and the same person.[1]

Where the bill is drawn on a partnership, the acceptance by any one of the firm will bind all.[2] And it has been held that the acceptance by one of the firm in his own name, of a bill drawn against the firm, would be binding on the firm, since the signature could have no meaning, unless it was intended as an acceptance for the firm.[3] On the other hand, if a bill be addressed to an individual member of a partnership, and in accepting he uses the firm name, he binds himself, and not the firm.[4]

If the bill is drawn against two or more persons jointly, all should accept, and if one of them refuses, the bill may be protested for his non-acceptance.[5] But those who do accept will be bound by their acceptance, although one or more of the drawees should refuse.[6]

The bill may be accepted by an agent of the drawee, if he has the authority to so act for his principal. And, although it has been doubted whether the holder is obliged to

[1] Hascall *v.* Life Association of America, 12 N. Y. S. C. (5 Hun) 152; Conro *v.* Port Henry Iron Co., 12 Barb. 27.

[2] Pinkney *v.* Hall, 1 Salk. 126; Mason *v.* Rumsey, 1 Camp. 384; Lloyd *v.* Rowland, 2 B. & Ad. 23. See *ante*, chap. VI.

[3] Wells *v.* Masterman, 2 Esp. 731; Mason *v.* Rumsey, 1 Camp. 384; Dolman *v.* Orchard, 2 C. & P. 104; Tolman *v.* Hannahan, 44 Wis. 133. But see, *contra*, Heenan *v.* Nash, 8 Minn. 409.

[4] Nichols *v.* Diamond, 24 Eng. L. & Eq. 403.

[5] Chitty on Bills, 73, 321; Dupays *v.* Shepherd, Holt, 297.

[6] Owen *v.* Van Uster, 10 C. B. (70 E. C. L. R.) 318; Nichols *v.* Diamond, 9 Exch. 154; Smith *v.* Milton, 133 Mass. 369. And it would be no variance to allege in the declaration on a bill addressed to A., B., and C., where only A. and B. accepted, that the bill was drawn on A. and B. and made no reference to C. Mountstephen *v.* Brooke, 1 B. & Ald. 224.

take an acceptance by an agent, since such an acceptance would increase the burden of proving the holder's title;[1] there are authorities which assert that he is bound to take such an acceptance, if the evidence of the agent's authority is clear.[2] Certainly, in any such case, the holder can treat the bill as dishonored, unless the clearest evidence of the agent's authority is furnished to him.[3] For, if an acceptance be taken from an unauthorized agent, it would sustain an action for damages against the pseudo agent,[4] but it would be otherwise valueless; and the failure to give to the drawer and indorsers notice of protest and non-acceptance would release them; unless the drawee ratifies the unauthorized acceptance of his agent.[5]

§ 220. **At what time acceptances may be made.** — Usually a bill is accepted within a reasonable time after its execution and delivery. But the acceptance may be made before the bill is drawn or when it is still incomplete.[6] The blank acceptance, so delivered by the acceptor, may be filled up by any one who gets possession of it;[7] and the acceptor is liable to a *bona fide* holder for whatever amount the bill

[1] Coore *v.* Callaway, 1 Esp. 115; Richards *v.* Barton, 1 Esp. 269; Byles, 113; Chitty, 321; 1 Daniel's Negot. Inst., 487.

[2] Thompson on Bills, 211; Beawes, No. 87.

[3] Atwood *v.* Munnings, 7 B. & C. (14 E. C. L. R.) 278; Thompson on Bills, 211.

[4] See Owen *v.* Van Uster, 10 C. B. (70 E. C. L. R.) 318.

[5] 1 Daniel's Negot. Inst., § 487.

[6] Harvey *v.* Cane, 34 L. T. R. 64; Molloy *v.* Delves, 7 Bing. 428; 5 M. & P. 275. See too Johnson *v.* Collins, 1 East, 105; Milne *v.* Prest, 4 Camp. 393; Baker *v.* Jubber, 1 M. & G. 212; Moiese *v.* Knapp, 30 Ga. 942; Coolidge *v.* Rayson, 2 Wheat. 66; Murdock *v.* Mills, 11 Met. 5; Russell *v.* Wiggin, 2 Story, 213; Wilder *v.* Savage, 1 Story, 22; Goodrich *v.* De Forest, 15 Johns. 6; Steman *v.* Harrison, 42 Pa. St. 49; Bayard *v.* Lathy, 2 McLean, 462; Read *v.* Marsh, 5 B. Mon. 8; Crowell *v.* Van Bibber, 18 La. Ann. 637.

[7] Schultz *v.* Ashley, 7 C. & P. (32 E. C. L. R.) 99.

may be filled up.[1] The acceptance may also be made after the bill has matured, and has been protested for non-payment.[2] In such a case, the bill will be regarded as payable on demand.[3] But unless the bill has been protested, the drawee's acceptance after a refusal to accept will not bind any one but himself.[4] The death of the drawer does not have any effect upon the validity of the bill. It may therefore be accepted after his death, and be binding upon the drawer's estate.[5] But it is said that the drawee cannot accept after he knows of the bankruptcy of the drawer,[6] although it will be a good acceptance, if the acceptor had no knowledge of the drawer's bankruptcy.[7]

It is customary, and the holder may require, that the date of the acceptance shall be written on the bill, particularly where the bill is payable a certain time after sight or on demand, in order that the holder may ascertain from the face, and without the help of extraneous evidence, when the bill becomes due.[8] When the acceptance bears no date,

[1] Bank of Commonwealth *v.* Carry, 2 Dana, 142; Moody *v.* Thielkeld, 13 Ga. 55; Montague *v.* Perkins, 22 Eng. L. & Eq. 516.

[2] Jackson *v.* Pigot, 1 Ld. Raym. 364; 12 Mod. 212; Wynne *v.* Raikes, 5 East, 513; Grant *v.* Shaw, 16 Mass. 344; Exchange Bank of St. Louis *v.* Rice, 98 Mass. 288; Mechanics' Bank *v.* Livingston, 33 Barb. 458; Williams *v.* Winans, 2 Green (N. J.), 339; Spalding *v.* Andrews, 48 Pa. St. 413; Stockwell *v.* Bramble, 3 Ind. 428.

[3] Jackson *v.* Pigot, 1 Ld. Raym. 364; Mitford *v.* Walcot, 1 Ld. Raym. 374; Billing *v.* De Vaux, 3 M. & G. 565; Christie *v.* Pearl, 7 M. & W. 491; Stein *v.* Yglesias, 5 Tyrw. 174; Bank of Louisville *v.* Ellery, 34 Barb. 630; Williams *v.* Winans, 2 Green (N. J.), 339; Stockwell *v.* Bramble, 3 Ind. 428.

[4] Wynne *v.* Raikes, 5 East, 514; Chitty on Bills, [*286] 324.

[5] Cutts *v.* Perkins, 12 Mass. 206; Debesse *v.* Napier, 1 McCord, 106; Hammond *v.* Barclay, 2 East, 227; Chitty on Bills, [*287] 325.

[6] Pinkerton *v.* Marshall, 2 H. Bl. 334.

[7] Wilkins *v.* Casey, 7 T. R. 711; Copland *v.* Stein, 8 T. R. 208.

[8] Daniel's Negot. Inst., § 395; Powell *v.* Monnier, 1 Atk. 611; Dufaur *v.* Oxenden, 1 M. & R. 90; Chitty on Bills, [*292] 330; Moore *v.* Willey, Buller N. P. 270. And the date need not be in the handwriting of

it is presumed, in the absence of specific evidence, to have been made a reasonable time after its execution, and prior to the day of payment.[1] And in every such case, the actual time of acceptance may be proved by parol evidence.[2]

§ 221. **When acceptance may be revoked.** — When the bill is once accepted and delivered to the holder, it is irrevocable, even with the consent of the holder, since the drawer and indorsers have a vested interest in the acceptance.[3] It has however been held that the acceptance is revocable even after delivery, as long as there is time enough to give the proper notice of non-acceptance, where the acceptance was given in consequence of a mistake of fact.[4] But the acceptance is not complete, as long as there has been no delivery to the holder. Simply writing an acceptance on the bill does not make a complete acceptance, and it may be cancelled before the return of the bill to the holder.[5] But in those States, in which verbal acceptances are legal, the acceptance will be irrevocable without a return of the bill to the holder, if the fact of acceptance has been communicated to the holder in any other way.[6]

the acceptor, in order to raise the presumption of its being the date of the acceptance. Glossup *v.* Jacob, 4 Camp. 227.

[1] Begbi *v.* Levi, 1 C. & J. 180; Roberts *v.* Bethel, 22 L. J. C. P. 69. But it has been said that acceptance may be presumed to have been made on the date of the bill. Chitty on Bills, [*300] 338.

[2] Kenner *v.* Creditors, 1 La. 120.

[3] Chitty on Bills, [*308] 347; 1 Daniel's Negot. Inst., § 493; Thornton *v.* Dick, 4 Esp. 270; Andressen *v.* First Nat. Bank, 1 McCrary, 252.

[4] Irving Bank *v.* Wetherald, 36 N. Y. 335. In California, by the code, it is revocable, as long as the bill has not been transferred to a purchaser for value. 1 Hittell's Code & Stat., § 8198.

[5] Cox *v.* Troy, 5 B. & Ald. 474; Wilkinson *v.* Johnson, 5 Dowl. & Ry. 408; 3 B. & C. 428; 1 Dow. & Ry. 38; Bentinck *v.* Dorrien, 6 East, 199; Trimmer *v.* Addy, 6 East, 206; Bank of Van Diemen's Land *v.* Bank of Victoria, L. R. 3 P. C. 526; Chapman *v.* Cottrell, 34 L. J. (N. S.) 186; Ralli *v.* Deniston, 6 Exch. 483. See Lindsay *v.* Price, 33 Tex. 280.

[6] Grant *v.* Hunt, 1 C. B. 44; Smith *v.* M'Lure, 5 East, 476.

It has also been held that an agreement to accept is revocable as long as the bill has not been presented for acceptance.[1]

§ 222. **Acceptances, verbal and written — Statute of frauds.** — Acceptances are usually written across the face of the bill; and it seems that the holder may insist upon such an acceptance, and refuse to take any other, whether written or verbal.[2] But, except in those States in which there are statutory provisions to the contrary, a verbal acceptance will be valid and effectual, if assented to by the holder.[3] In England, and in many of the United States, statutes now expressly require that all acceptances shall be in writing, and by most of these States the written acceptance is required to be signed by the acceptor.[4] The

[1] Ilsley *v.* Jones, 12 Gray, 260; First Nat. Bank *v.* Clark, 61 Md. 401. In the last case, the agreement to accept and the revocation of that agreement were sent to the drawer in separate telegrams, and the drawer in negotiating the bill fraudulently suppressed the telegraphic revocation.

[2] Chitty on Bills, [*287] 326; 1 Daniel's Negot. Inst., § 504.

[3] Scudder *v.* Union Nat. Bank, 91 U. S. 406; Bird *v.* McElvaine, 10 Ind. 40; Stockwell *v.* Bramble, 3 Ind. 428; Exchange Bank of St. Louis *v.* Rice, 93 Mass. 288; Cook *v.* Baldwin, 120 Mass. 317; Pierce *v.* Kittredge, 115 Mass. 374; Storer *v.* Logan, 9 Mass. 55; Wells *v.* Brigham, 6 Cush. 6; Julian *v.* Shobrook, 2 Wils. 9; Sproat *v.* Matthews, 1 T. R. 182; Grant *v.* Shaw, 16 Mass. 341; Dunavan *v.* Flynn, 118 Mass. 537; Fisher *v.* Beckwith, 19 Vt. 31; Arnold *v.* Sprague, 34 Vt. 402; Jarvis *v.* Wilson, 46 Conn. 90; Williams *v.* Winans, 2 Green (N. J.), 339; Ward *v.* Allen, 2 Met. 53; Spaulding *v.* Andrews, 48 Pa. St 411; Mull *v.* Bricker, 75 Pa. St. 255; Leonard *v.* Mason. 1 Wend. 522; Walker *v.* Lide, 1 Rich. 249; Bancroft *v.* Denny, 5 Houst. 9; Miller *v.* Neihaus, 21 Ind. 401; Hunter *v.* Cobb, 1 Bush. 239; McCutcheon *v.* Rice, 56 Miss. 455; Phelps *v.* Northrup, 56 Ill. 156; Walters *v* G. H. & Co., 1 Tex. App. 753; Kennedy *v.* Geddes, 8 Port. 263; Whilden *v.* Merchants', etc., Bank, 64 Ala. 1; St. Louis Stock Yards *v.* O'Reilly, 85 Ill. 546; Sturges *v.* Fourth Nat. Bank, 75 Ill. 595.

[4] 19 and 20 Vict., ch. 971, § 6; *Arkansas*, Rev. Stat. 1874, § 549; *Georgia*, 1 P. L. 62, No. 117, 1880. In the following States it is required that the acceptor sign the acceptance: *Alabama*, 1876, Code, § 2101; *Arizona*,

question whether parol acceptances are binding upon the acceptor is, in those States in which the matter is not expressly regulated by statute, further complicated by its relation to a provision of the statute of frauds. The provision is that all promises to answer for the debt of another shall be in writing and signed by the promisor. If an acceptance or a promise to accept is a promise to answer for the debt of another, then it is within the statute of frauds, and must be in writing and signed, in order to be binding upon the drawee. And so it has been held by some of the cases.[1] Other cases maintain that the acceptance is a promise to answer for the debt of another, and therefore within the statute of frauds, when the drawer accepts for accommodation, *i.e.*, without having in his possession funds of the drawer with which to pay the bill.[2] But if the drawee has funds of the drawer, and the draft is in fact a

1877, C. L., §§ 3469–3471; *California*, 1 Hittell's Codes & Stats., § 8193; *District of Columbia*, 1857, R. C. 134; *Idaho*, 1874, R. L. 653; *Kansas*, 1879, C. L., ch. 14, § 8; *Maine*, 1871, Rev. Stat., ch. 32, § 10; *Michigan*, 1871, 1 C. L. 516, § 7; *Minnesota*, 1878, G. S. 316, § 13; *Mississippi*, 1880, Rev. Code, § 1133; *Nevada*, 1873, 1 C. L., ch. 5, § 6; *New York*, Rev. Stat. 768, § 6; 1882, R. S. 2242; *Oregon*, 1872, Deady G. L. 718, § 7; *Pennsylvania*, 1881, P. L. 17; *Washington Territory*, 1881, Code, §§ 2302–2306; *Wisconsin*, 1878, R. S., § 1681. In South Carolina (1873, R. S. 320, § 11), and *Dakota* (1877, Rev. Code, § 1896), the acceptance is required to be in writing on the bill. In the following States it is provided by the statutes that if the acceptor refuses to write the acceptance on the bill, the bill may be treated as dishonored, and protested for non-acceptance; *Alabama*, 1876, Code, § 2103; *Arizona*, 1877, C. L., §§ 3469–3471; *Arkansas*, 1874, R. S., § 552; *California*, 1880, 1 Hittell's Codes & Stat., § 8193; *District of Columbia*, 1857, R. C. 134, § 9; *Idaho*, 1874, R. L. 653, § 9; *Kansas*, 1879, C. L., ch. 14, § 11; *Mississippi*, 1880, R. C., § 1133; *Missouri*, 1879, 1 R. S., § 536; *New York*, 1882, 3 R. S. 2243, § 9; *Washington Territory*, 1881, Code, §§ 2302–2306.

[1] Plummer *v.* Lyman, 49 Me. 229; Manley *v.* Geagan, 105 Mass. 445; Wakefield *v.* Greenhood, 29 Cal 600.

[2] Pike *v.* Irwin, 1 Sandf. 14; Quin *v.* Hanford, 1 Hill, 82; Carville *v.* Crane, 5 Hill, 583; Taylor *v.* Drake, 4 Strobh. 431; Brown on Statute of Frauds, 174.

direction to pay a part or the whole of those funds to the payee or indorser of the bill, the acceptance is therefore not a promise to answer for the debt of another, but a promise to pay his own debt to some one other than his creditor. It is therefore not within the statute of frauds.[1] And since the acceptance involves an admission that the drawee has such funds, he is estopped from denying that he has such funds, in any action by a holder for value and without notice.[2] But the great majority of the cases, which hold that verbal acceptances are valid and binding, maintain directly or inferentially that the statute of frauds does not in any case apply to commercial or negotiable paper.[3]

§ 223. **What words amount to acceptance.** — The acceptance is usually made by writing the word "accepted"

[1] In Townsley *v.* Sumrall, 2 Pet. 170, Story, J., said: "This is not a case falling within the objects or mischiefs of the statute of frauds. If A. says to B., pay so much money to C., and I will repay it to you, it is an original, independent promise; and if the money is paid on the faith of it, it has always been deemed an obligatory contract, even though it be by parol, because there is an original consideration moving between the immediate parties to the contract. Damage to the promisee constitutes as good a consideration as a benefit to the promisor. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises made by different persons at the same time upon the same general consideration. D'Wolf *v.* Rabaud, 1 Pet. 476." See also Shields *v.* Middleton, 2 Cranch C. C. 205; Van Reinesdyck *v.* Kane, 1 Gall. C. C. 633; Pike *v.* Irwin, 1 Sandf. 14; Spadine *v.* Reed, 7 Bush, 455; Beshears *v.* Rowe, 46 Mo. 501; Strohecker *v.* Cohen, 1 Spears, 349. See Spalding *v.* Andrews, 48 Pa. St. 411; Dunbar *v.* Smith, — Ala. (1881)

[2] Carville *v.* Crane, 5 Hill, 583; Taylor *v.* Drake, 4 Strobh. 431.

[3] See cases cited in preceding notes. See also Butler *v.* Prentiss, Mass. 430; Pillans *v.* Van Mierop, 3 Burr. 1674; Nelson *v.* First Nat. Bank, 48 Ill. 41; Chitty on Bills, 4; 1 Daniel's Negot. Inst., § 567; Raborge *v.* Reyton, 2 Wheat. 385; Fisher *v.* Beckwith, 19 Vt. 31; Dull *v.* Brucker. 76 Pa. St. 255; Laflin Powder Co. *v.* Sinsheimer, 48 Md. 411; Storer *v.* Logan, 9 Mass. 55. The same, it is held, even where it is an accommodation acceptance. Jarvis *v.* Wilson, 46 Conn. 90.

across the face of the bill, and adding the signature of the drawee.[1] According to some of the statutes, it is required that the acceptance shall always be signed by the acceptor.[2] But by the common-law merchant, the signature is not necessary to a good acceptance.[3] So also is the word "accepted" not necessary. Any other word or expression, which by reasonable intendment can be construed to mean an acceptance, will be sufficient. Thus, in written acceptances on the bill, the words "seen,"[4] "presented,"[5] "honored,"[6] "I will pay the bill,"[7] "excepted," evidently intended for "accepted,"[8] "payment guaranteed,"[9] writing the day and month when presented,[10] directing another to pay the bill for the drawee,[11] and simply the signature of the drawee, without any words of explanation,[12] have all been held to be sufficient acceptances.[13]

[1] The acceptance is usually written across the face of the bill, but that is not necessary. It may appear on any part of the bill, and may even be written on the back. See 1 Daniel's Negot. Inst, § 498; Thompson on Bills, 220.

[2] See preceding note.

[3] Philips *v.* Frost, 19 Me. 77; Corlett *v.* Conway, 5 M. & W. 653; Leslie *v.* Hastings, 1 Moody & M. 119; Dufaur *v.* Oxenden, 1 Moody & M. 90.

[4] Barnet *v.* Smith, 10 Foster, 256; Spear *v.* Pratt, 2 Hill, 582.

[5] 1 Parsons' N. & B. 282; 1 Daniel's Negot. Inst., § 497.

[6] Anonymous, Comb. 401.

[7] Ward *v.* Allen, 2 Metc. 53; Leach *v.* Buchanan, 4 Esp. 226.

[8] Miller *v.* Butler, 1 Cranch C. C. 170; Meyer *v.* Beardsley, 1 Vroom, 236.

[9] Block *v.* Wilkinson, 42 Ark. 253.

[10] 1 Parsons' N. & B. 243; 1 Daniel's Negot. Inst., § 497.

[11] Moore *v.* Whithy, Butler N. P. 270; Harper *v.* West, 1 Cr. C. C. 192.

[12] Spear *v.* Pratt, 2 Hill, 582; Wheeler *v.* Webster, 1 E. D. Smith, 1. And in such a case it is permissible for the drawee to show that he refused to write the word "accepted" above the signature, in order to prove that he did not intend that his signature should operate as an acceptance. Kaufman *v.* Barrenger, 70 La. Ann. 419.

[13] It was held in Massachusetts that the words, "I take notice of the above," would not necessarily import an acceptance. Cook *v.* Baldwin, 120 Mass. 317.

The greatest difficulty, in determining whether the words used are sufficient to constitute an acceptance, is to be found when the acceptances are either verbal or written on a separate paper. The following have been held to be sufficient: "Leave your bill with me, and I will accept it;"[1] "If the bill comes back, I will pay it;"[2] "I am prepared to pay your bill;"[3] "That is my signature, and I will pay the bill,"[4] and the like.[5]

On the other hand, when the words are of indefinite meaning, they will not suffice to make a good acceptance. The words were held to be insufficient in the following cases: "There is your bill, it is all right;"[6] "I will pay it, but I cannot now, I'll give you a bill at three months;"[7] "The bill shall have attention."[8]

Part payment and crediting it on the bill is not sufficient to bind the drawee to pay the balance.[9] But it has been

[1] Chitty Jr. 12; 1 Daniel's Negot. Inst., § 504*a*.

[2] Cox *v.* Coleman, Chitty Jr. on Bills, 294. See also Grant *v.* Shaw, 16 Mass. 341.

[3] Billing *v.* Devaux, 3 Man. & G. 565.

[4] Leach *v.* Buchanan, 4 Esp. 226; Edson *v.* Miller, 22 N. H. 183; Hatcher *v.* Stalworth, 26 Miss. 376; Sturges *v.* Fourth Nat. Bank, 75 Ill. 595.

[5] "The bill is correct and shall be paid." Ward *v.* Allen, 2 Metc. 53; "If you will send it to the counting-house again, I will give directions for its being accepted," held to be good, if presented again, Anderson *v.* Hicks, 3 Camp. 179; the exclamation, "What! not accepted! we have had the money; they ought to be paid, but I do not interfere in this business, you should see Mr. P." Fairlie *v.* Herring, 11 Moore, 320; 3 Bing. 525. "Will pay A. Harper, draft $2,300 for stock" by telegram. Coffman *v.* Campbell, 87 Ill. (1878) 98; a promise to pay bill drawn at sight on a subsequent day. Clark *v.* Gordon, 3 Rich. 311. But see Peck *v.* Cochran, 7 Pick. 35.

[6] Powell *v.* Jones, 1 Esp. 17.

[7] Reynolds *v.* Peto, 11 Exch. 410; *s. c.* 33 Eng. L. & Eq. 481.

[8] Rees *v.* Warwick, 2 Barn. & Ald. 113.

[9] First Nat. Bank *v.* Whitman, 94 U. S. 343; Bassett *v.* Haines, 9 Cal. 261; Cook *v.* Baldwin, 120 Mass. 317. It is insufficient, even where there is an indorsement of a calculation as to the balance due. Hunter *v.* Cobb, 1 Bush, 239. But see Gallagher *v.* Black, 44 Me. 99.

held in Michigan to be a good acceptance, where there was indorsed on the bill "paid on this order" and signed by the drawee.[1]

But, in any event, words of the description just given, will not amount to an acceptance, unless they are addressed to the drawee or his agent. They are insufficient, if addressed to a stranger.[2]

§ 224. Implied acceptances, detention and destruction of bill. — It is held that the acceptance of a bill may be implied from any conduct of the drawee, which is inconsistent with the act of refusing acceptance.[3] Thus, if a bill is drawn for the drawee's accommodation, and he has it discounted, his negotiation of it, with a promise to pay at maturity, will be an implied acceptance.[4] So, also, will part payment, with a certificate of deposit for the balance, be an implied acceptance.[5]

The more common cases of implied acceptances, are those which arise from agreements to accept. These cases are discussed in a separate section.[6]

It is also sometimes held that if the drawee detains a bill for a longer period than twenty-four hours, without giving a reply, the detention will operate as an implied acceptance of the bill. This is especially true, where the drawee

[1] Peterson *v.* Hubbard, 28 Mich. 197. And so also where in addition to the part payment, there was indorsed "It being all the drawee agrees to pay unless the drawer intended the order to be exclusive of twenty dollars which the drawee had previously paid without order." Philips *v.* Frost, 29 Me. 77.

[2] Martin *v.* Bacon, 2 Mills, 132; 1 Parsons' N. & B. 286; 1 Daniel's Negot. Inst., § 507.

[3] 1 Parson's N. & B. 287; 1 Negot. Inst., § 499; Billing *v.* DeVaux, 3 M. & G. 565; McCutchen *v.* Price, 56 Miss. 455.

[4] Bank of Rutland *v.* Woodruff, 34 Vt. 89; 1 Daniel's Negot. Inst., § 501. But see Swope *v.* Ross, 40 Pa. St. 186.

[5] Andressen *v.* First Nat. Bank, 2 Fed. Rep. 125. As to the effect of part payment generally, see *ante*, § 223.

[6] See *post*, § 226.

makes use of language, from which an intention to accept may be inferred.[1] Some of the cases seem to recognize that a simple detention amounts to an acceptance, unless explained by accompanying circumstances;[2] but since it is the duty of the holder to send or return for the bill at the expiration of the twenty-four hours, or whatever other time is permitted to the drawee for the purpose of deliberation, it does not seem reasonable that the detention of the bill should operate as an implied acceptance, unless there has been a demand for the return of the bill.[3] It has been held that the willful destruction of the bill, will support the implication of an acceptance, unless there has been a previous refusal to accept.[4] And this is now provided by

[1] Chitty on Bills, [*295] 334; 1 Daniel's Negot. Inst., § 499*a*; Harvey *v.* Martin, 1 Camp. 425. In Harvey *v.* Martin, *supra*, the drawee was told by the payee that an unreasonable detention of the bill will be treated as an implied acceptance. In Hough *v.* Loring, 24 Pick. 254, the detention was coupled with a statement of the drawee to a third person that he intended to accept.

[2] Hall *v.* Steele, 68 Ill. 231; Dunavan *v.* Flynn, 118 Mass. 537.

[3] See Jenne *v.* Ward, 2 Stark. 326; 1 B. & Ald. 654; Mason *v.* Barff, 2 B. & Ald. 26; Koch *v.* Howell, 6 Watts & S. 350. In Mason *v.* Barff, *supra*, the bill was detained for ten or twelve days, in expectation of receiving funds from the drawer to cover the amount of the bill. In Koch *v.* Howell, 6 Watts & S. 350, the agent of the drawee originally detained the bill until he could submit it to the drawee who retained possession of the bill until the trial of the action on it, but refused to accept. In many of the States, it is now provided by statute, that if the drawee refuses to return the bill within twenty-four hours after receiving it, he will be presumed to have accepted it. *Alabama*, 1876, Code, § 2105; *Arizona*, 1877, C. L., § 3474; *Arkansas*, 1874, R. S., § 554; *District of Columbia*, 1857, Rev., ch. 135, § 11; *Idaho*, 1874, R. L. 653, § 11; *Kansas*, 1879, C. L., ch. 14, § 13; *Missouri*, 1879, 1 R. S., § 538; *New York*, 1882, 3 R. S. 2243, § 11; *Washington Territory*, 1881, Code, § 2307. It is expressly held under the New York statute, that there must be a demand and refusal to return, in order that the detention may operate as an implied acceptance. Matteson *v.* Moulton, 11 Hun, 268; *s. c.* 79 N. Y. 627. According to the California Code, the refusal of the drawee to return the bill, makes it payable immediately. 1 Hittel's Codes & Stats., § 8195.

[4] Jenne *v.* Ward, 2 Stark. 326; 1 B. & Ald. 653.

statute in New York and Missouri.[1] Independently of statute, it would seem illogical to hold that the destruction of a bill implied an intention to accept, and by acceptance to pay the bill to the holder.[2] It would seem more logical to hold that the willful destruction of the bill would be the strongest evidence of a determination not to honor the bill, but that this tortious act would subject the drawee to an action in trover.[3]

§ 225. **Acceptances on separate paper.** — Unless a statute prohibits it,[4] the acceptance may be written on a separate paper, instead of across the bill.[5] Acceptances may be communicated by telegrams, as well as by letter.[6] But in many of the States it is provided by statute, and elsewhere it is held independently of statute, that the holder can refuse to take any acceptance that is not written on the bill.[7]

It is a general rule that an acceptance written on a separate paper, will be an effective acceptance only as to those persons who take the bill with knowledge of the acceptance and on the strength of it. A holder, who takes the bill

[1] 1882, 3 R. S. N. Y. 2243, § 11; 1 R. S. Mo. 1879, § 538. See Pousch *v.* Duff, 35 Mo. 312.

[2] Chitty on Bills, [*296] 335.

[3] Story on Bills, § 248; 1 Parsons' N. & B. 285; 1 Daniel's Negot. Inst., § 500.

[4] It is so prohibited in South Carolina and Dakota. R. S. So. Ca. (1873), 320, § 11; Rev. Code, Dakota (1877), § 1896.

[5] 1 Daniel's Negot. Inst., § 503; Billing *v.* DeVaux, 3 M. & G. 565; Fairlie *v.* Herring, 3 Bing. 625; Grant *v.* Hunt, 1 M. G. & S. 44; Wynne *v.* Raikes, 5 East, 514; Pierson *v.* Dunlap, Cowp. 571; Ex parte Dyer, 6 Ves. 9; Clark *v.* Cock, 4 East, 57; McEvers *v.* Mason, 10 Johns. 207; Greele *v.* Parker, 5 Wend. 414.

[6] Coffman *v.* Campbell, 87 Ill. 98; First Nat. Bank *v.* Clark, 61 Md. 401; Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1; Central Sav. Bank *v.* Richards, 109 Mass. 413.

[7] See *ante*, § 222.

without knowledge of the separate acceptance can not hold the drawee liable on it.[1]

§ 226. **Agreements to accept.** — The authorities agree that a written promise to the drawer to accept a bill, when communicated to the holder, will have the same effect, and will be treated, as an acceptance, whether the bill be already in existence,[2] or is not yet executed.[3] In both

[1] 1 Parsons' N. & B. 286; Worcester Bank *v.* Wells, 8 Met. 107; McEvers *v.* Mason, 10 Johns. 207. And in the following States, this is made a provision of the statutes: *Arizona* (1877, C. L., §§ 3469-3471); *Arkansas* (1874, R. S., § 550); *California* (1880, 1 Hittell's Codes & Stats., § 8196); *Dakota* (1877, Rev. Code, § 1898); *District of Columbia* (1857, R. C. 134, § 7); *Idaho* (1874, R. L. 653, § 7); *Kansas* (1879, C. L., ch. 14, §§ 9, 10); *Missouri* (1879, R. S., §§ 536, 537); *Nevada* (1873, 1 C. L., ch. 5, § 7); *New York* (1882, 3 R. S. 2242).

[2] "The defendant has thereby enabled another with truth to assert, and furnished him with the means of proving that assertion, by the production of the defendant's letter, that he had undertaken to accept the bills, which in ordinary mercantile understanding amounts to an acceptance, and by that credit was attached to the bills. * * * It may be for the convenience of mercantile affairs that a bill may be accepted by a collateral writing, without the bill itself coming to the actual touch of the acceptor, which would sometimes create great delay. This acceptance being by writing comes within all the cases cited." Lord Ellenborough in Clarke *v.* Cock, 4 East, 57. See also Wilson *v.* Clements, 3 Mass. 10; Musgrove *v.* Hudson, 2 Stew. 464; Storer *v.* Logan, 9 Mass. 58; Savannah Nat. Bank *v.* Hoskins, 101 Mass. 370; Grant *v.* Shaw, 16 Mass. 341; McEvers *v.* Mason, 10 Johns. 213; Wakefield *v.* Greenhood, 29 Cal. 597; Goodrich *v.* Gordon, 15 Johns. 6; Greele *v.* Parker, 5 Wend. 514; De Tastett *v.* Crousillot, 2 Wash. C. C. 132; Russell *v.* Wiggin, 2 Story C. C. 214; Mayfield *v.* Wheeler, 37 Tex. 256; Cassel *v.* Dows, 1 Blatchf. C. C. 335; Edson *v.* Fuller, 2 Foster, 183; Johnson *v.* Clark, 39 N. Y. 216; Steman *v.* Harrison, 42 Pa. St. 57; Ulster Co. Bank *v.* McFarlan, 5 Hill, 432; Ontario Bank *v.* Worthington Bk., 12 Wend. 593; Vance *v.* Ward, 2 Dana, 95; Carrollton Bank *v.* Tayleur, 16 La. (o. s.) 490; Crowell *v.* Van Bibber, 18 La. Ann. 637; Cook *v.* Miltenberger, 23 La. Ann. 377.

[3] "Upon a review of the cases which are reported, a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms, not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the

classes of cases, but more especially in the case of non-existing bills, it is necessary that the promise to accept must describe the bills to be accepted particularly enough to ascertain whether the bill in suit was intended to fall within the promise.[1] If the promise is of a general or indefinite character, it will not constitute an acceptance; but if the refusal to accept the bill in question is proven to be a breach of the promise to accept, the promisor can be sued for the breach of his contract, but not as an acceptor.[2]

letter, a virtual acceptance." Coolidge *v.* Payson, 2 Wheat. 66; Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Pet. 111; Gates *v.* Parker, 43 Me. 544; Wilson *v.* Clements, 3 Mass. 10; Storer *v.* Logan, 9 Mass. 58; Goodrich *v.* Gordon, 15 Johns. 11; Greele *v.* Parker, 5 Wend. 414; Kennedy *v.* Geddes, 8 Porter (Ala.), 268; *s. c.* 3 Ala. 581; Whilden *v.* M. & P. N. B., 64 Ala. 30; Lathrop *v.* Harlow, 23 Mo. 209; Steman *v.* Harrison, 42 Pa. St. 57; Valle *v.* Cerre, 36 Mo. 591; Kendrick *v.* Campbell, 1 Bailey, 552; Vance *v.* Ward, 2 Dana, 95; Beach *v.* State Bank, 2 Ind. 488; Wildes *v.* Savage, 1 Story C. C. 22; Russell *v.* Wiggin, 2 Story C. C. 214; Johnson *v.* Blakemore, 28 La. Ann. 140; Mason *v.* Hunt, 1 Doug. 297; Merchants' Bank *v.* Griswold, 16 N. Y. S. C. (9 Hun) 565. A promise to accept, sent by telegram, has been held to have the same effect. Molson's Bank of Montreal *v.* Howard, 8 Jones & S. 156; Central Saving Bank *v.* Richards, 109 Mass. 414, Morton, J.: "The telegram sent to the St. Louis Zinc Company was an authority for it to draw the bill of exchange in suit, and necessarily implied a promise to accept it. This telegram was shown to the plaintiffs who thereupon discounted the bill. They took the bill upon the faith of the defendant's promise, and are entitled to hold them as acceptors."

[1] In Franklin Bank *v.* Lynch, 52 Md. 270, the telegraphic communication "You may draw on me for $700," was held to be too indefinite to constitute an acceptance. And in Boyce *v.* Edwards, 4 Pet. 111, the communication was: "Mr. John Doe is authorized to draw on us for the amount of any lots of cotton which he may buy and ship to us, as soon after as opportunity will offer; such drafts will be duly honored," etc.

[2] Coolidge *v.* Payson, 2 Wheat. 66; Schimmelpennich *v.* Bayard, 1 Pet. 264; Boyce *v.* Edwards, 4 Pet. 111; Ulster County Bank *v.* McFarland, 3 Den. 553; Carnegie *v.* Morrison, 4 Metc. 406; Cassel *v.* Dows, 1 Blatch. C. C. 335; Von Phul *v.* Sloan, 2 Rob. (La.) 148; Carrollton Bank *v.* Tayleur, 16 La. (o. s.) 490. In an action for the breach of the promise to accept, whatever damage the holder of the bill actually suffered, not exceeding the amount of the bill with interest and costs, may be recovered. It

But there are authorities which hold that no nicety of description is required to make the promise to accept the equivalent of an acceptance, as long as the language of the promise was general enough to include the bill in question.[1]

It is also necessary, in the case of non-existing bills, that they be drawn within a reasonable time after the promise to accept was given.[2]

The promise to accept is certainly not the same as an acceptance, and it can only operate as an acceptance, when the refusal to accept would work an injury to one who took the bill in reliance upon the performance of the promise. In other words, in such a case, the drawee is estopped from denying that the bill had not been accepted. But in order that the drawer may be estopped by his promise to accept, the promise must be communicated to the payee or holder,

may be the whole amount of the bill, and it may be only nominal. Ilsley *v.* Jones, 12 Gray, 260; Riggs *v.* Lindsay, 7 Cranch, 500.

[1] Bissell *v.* Lewis, 4 Mich. 450; Parker *v.* Greele, 2 Wend. 545; Valle *v.* Cerre, 36 Mo. 575; Greele *v.* Parker, 5 Wend. 414; Barney *v.* Newcomb, 9 Cush. 46; Naglee *v.* Lyman, 14 Cal. 451; Bank of Michigan *v.* Ely, 17 Wend. 508; 1 Daniel's Negot. Inst., § 561. In Ulster County Bank *v.* McFarland, 5 Hill, 444; 3 Denio, 553, where a letter was addressed to the drawers as follows: "I hereby authorize you to draw on me, at ninety days, from time to time, for such amounts as you may require, provided that the whole amount running and unpaid shall not exceed three thousand dollars," etc., Bronson, J., citing the cases given above, said: "These cases show that the written promise to accept need not contain a particular description or identification of the bill to be drawn. It is enough that it be drawn in pursuance of the authority. The plaintiff received and discounted the bill upon the faith of the letter, and it was drawn in pursuance of the authority; the judge was right in charging the jury that there was a sufficient acceptance." See also to same effect, Nelson *v.* First Nat. Bank, 48 Ill. 39, where the promise to pay the checks of the drawer.

[2] Coolidge *v.* Payson, 3 Wheat. 66; Wilson *v.* Clements, 3 Mass. 1; Cassel *v.* Dows, 1 Blatch. C. C. 335; Greele *v.* Parker, 5 Wend. 414. In Boyce *v.* Edwards, 4 Pet. 111, the bill was written two years after the promise, and in First Nat. Bank *v.* Hensley, 2 Fed. Rep. 609, one year after, and in both cases the delay was held to be unreasonable.

and the holder must take the bill in reliance upon the drawee's promise to accept. And this is the ruling of most of the cases.[1] But there are a few cases, which hold that a written promise to accept will operate as an acceptance in favor of a holder who did not know of the promise when he took the bill, and consequently could not have taken the bill in reliance upon the promise.[2]

In those States, in which there are no statutes to the contrary, a verbal promise to accept, like a verbal acceptance, is as binding as a written promise.[3] It is however held, rather uniformly, that in order that a verbal promise can operate as an acceptance, it must be communicated to the holder, before he takes the bill.[4] But it is held that in no

[1] Goodrich *v.* Gordon, 15 Johns. 6; Pierson *v.* Dunlap, 2 Cowp. 571; Wilson *v.* Clements, 3 Mass. 10; Storer *v.* Logan, 9 Mass. 58; Payson *v.* Coolidge, 2 Wheat. 66; Gates *v.* Parker, 43 Me. 544; New York, etc., Bank *v.* Gibson, 5 Duer, 574; McEvers *v.* Mason, 10 Johns. 207; Lewis *v.* Kramer, 3 Md. 289; Pollock *v.* Helm, 54 Miss. 1; Baring *v.* Lyman, 1 Story C. C. 396; Kennedy *v.* Geddes, 8 Port. (Ala.) 268; Sherwin *v.* Bingham, 39 Ohio St. 137; Loque *v.* Woodruff, 28 Ga. 649; Bank of St. Louis *v.* Rice, 98 Mass. 288; *s. c.* 107 Mass. 41; Burns *v.* Rowland, 40 Barb. 368.

[2] Powell *v.* Mounier, 1 Atk. 611; Wynne *v.* Raikes, 5 East, 514; Pilan *v.* Mierop, 3 Burr. 1663; Jones *v.* Bank of Iowa, 34 Ill. 313; Mason *v.* Dousay, 35 Ill. 424. In Read *v.* Marsh, 5 B. Mon. 10, Breck, J., said: "It seems to be now well settled that a letter, promising to accept or protect a bill, whether written before or after it is drawn, may operate as an acceptance, and that it may so operate, although the holder has not been induced by such letter or promise to take the bill."

[3] Johnson *v.* Callings, 1 East, 98; Townsley *v.* Sumrall, 2 Pet. 170; Bank of Ireland *v.* Archer, 11 M. & W. 383; Kennedy *v.* Geddes, 8 Port. (Ala.) 268; Spaulding *v.* Andrews, 48 Pa. St. 411; Scudder *v.* Union Nat. Bank, 91 U. S. 406; Light *v.* Powers, 13 Kan. 96. But in many of the States statutes prohibit all parol promises to accept. Blakiston *v.* Dudley, 5 Duer, 373; Brinkman *v.* Hunter, 73 Mo. 172; R. S. Mo. (1879), § 537 See *ante*, § 222, for statutes prohibiting all verbal acceptances and for a discussion of relation of statute of frauds to acceptances.

[4] Johnson *v.* Collings, 1 East, 98; Boyce *v.* Edwards, 4 Pet. 122; Espy *v.* Bank of Cincinnati, 18 Wall. 620; Oberman *v.* Hoboken City Bank, 2 Vroom, 564; Wilson *v.* Clements, 3 Mass. 10; Strohecker *v.* Cohen, 1 Spears, 327; Bank of Michigan *v.* Ely, 17 Wend. 508. But see *contra*, Spaulding *v.* Andrews, 48 Pa. St. 411.

event can the promise to accept be treated as an acceptance, where the bill is one payable at or after sight, for the reason that there must be a presentment in order to fix the day of payment;[1] and a mere promise to accept, without more, would cover only bills payable at the drawee's place of business.[2]

§ 227. **Conditional and qualified acceptance.** — The holder is entitled to an absolute and unconditional acceptance, according to the tenor of the bill; and if a conditional or qualified acceptance is offered in its place, the holder may refuse it and protest the bill for non-acceptance.[3] The holder may, however, take a conditional or qualified acceptance, if he wishes; but if he does, he must at once notify the drawer and indorsers and obtain their consent to the modification in the acceptance. If he takes the conditional

[1] Story on Bills, § 249; Edwards on Bills, 414; Wildes *v.* Savage, 1 Story C. C. 28; Franklin Bank *v.* Lynch, 52 Md. 270.

[2] Michigan State Bank *v.* Leavenworth, 28 Vt. 209.

[3] Boehm *v.* Garcias, 1 Camp. 425; Gammon *v.* Schmall, 5 Taunt. 344; Parker *v.* Gordon, 7 East, 385; Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Shackleford *v.* Hooker, 54 Miss. 716; Ford *v.* Angelrodt, 37 Mo. 50; Green *v.* Raymond, 9 Neb. 298. In Boehm *v.* Garcias, 1 Camp. 425, the bill was drawn on Lisbon "payable in effective and not in val reals." The drawee offered to accept payable in val demaros, another kind of currency. In holding this to be a conditional or qualified acceptance, Lord Ellenborough said: "The plaintiff had a right to refuse this acceptance; the drawee has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in demaros might have satisfied the term *effective*, an acceptance in demaros was not a sufficient acceptance of the bill drawn payable in effective. The drawee ought to have accepted generally, and an action being brought against them on the general acceptance the question would probably have arisen as to the meaning of the term. A general protest or notice of non-acceptance would indicate a refusal of the conditional acceptance, and preclude him from afterward availing himself of it (Sproat *v.* Matthews, 1 T. R. 182; Bentinck *v.* Dorrien, 6 East, 200), unless it can be shown that he did not know of the conditional acceptance, when he protested the bill." Fairlie *v.* Herring, 3 Bing. 625; 11 Moore, 520.

or qualified acceptance against the consent of the parties secondarily liable, he does so at his risk.[1]

The rule just stated is certainly true under all circumstances in respect to indorsers.[2] But it is claimed that the drawer impliedly guarantees that the drawee is in funds wherewith to pay the bill, and consequently if the drawee accepts on condition that he is in funds, it is not a conditional acceptance as to the drawer, and the drawer's consent to such an acceptance need not be obtained.[3]

A verbal acceptance may be subjected to conditions, like a written acceptance,[4] but the condition must be made contemporaneous with the acceptance. The character of the acceptance cannot be varied by a subsequent agreement.[5] If the acceptance is written, it may be varied by another contemporaneous writing, and this condition will be as binding as if it had been incorporated into the written acceptance, except as against *bona fide* holders who take the bill without notice of it.[6] But a written acceptance cannot be varied by any contemporary parol agreement.[7]

[1] Petit *v.* Benson, Cumberbach, 452; Julian *v.* Shorbrook, 2 Wills. 9; Anderson *v.* Hick, 3 Camp. 179; Paton *v.* Winter, 1 Taunt. 422; Robinson *v.* Ames, 20 Johns. 146; Russell *v.* Phillips, 14 Q. B. 900; Smith *v.* Abbott, 2 Str. 1152. Mitchell *v.* Barring, 10 B. & C. 4; Sebag *v.* Abithol, 4 M. & Sel. 462; Wintersmith *v.* Post, 4 Zab. 420; Shackleford *v.* Hooker, 54 Miss. 716; McCutchen *v.* Rice, 56 Miss. 455; Ford *v.* Angelrodt, 37 Mo. 50; Crowell *v.* Plant, 53 Mo. 145.

[2] Edwards on Bills, 428, 430; 1 Daniel's Negot. Inst., § 511.

[3] Walker *v.* Bank of the State, 13 Barb. 636; Edwards on Bills, 429; Robinson *v.* Ames, 20 Johns. 146.

[4] 1 Daniel's Negot. Inst., § 517; Edwards on Bills, 426.

[5] Wells *v.* Brigham, 6 Cush. 6.

[6] Bowerbank *v.* Monteiro, 4 Taunt. 884; Montague *v.* Perkins, 22 Eng. L. & Eq. 516; United States *v.* Bank of Metropolis, 15 Pet. 377; Merritt *v.* Duncan, 7 Heisk. 156.

[7] Hoare *v.* Graham, 3 Camp. 57; Adams *v.* Wordley, 1 M. & W. 347; Besant *v.* Cross, 10 C. B. (70 Eng. C. L.) 896; Meyer *v.* Beardsley, 1 Vroom, 236; Foster *v.* Clifford, 44 Wis. 569; Goodwin *v.* McCoy, 13 Ala. 271; Hunting *v.* Emmart, 55 Md. 265; Haverin *v.* Donnell, 7 Smed. & M. 244; Coffman *v.* Campbell, 87 Ill. 98.

The drawer may, in drawing the bill, call for a conditional acceptance, and in such a case nothing but this conditional acceptance would be according to the tenor of the bill, and therefore no other would be binding on the drawer and indorsers.[1]

The following may be mentioned as illustrative examples of conditional and qualified acceptances: "To pay when goods consigned to me are sold;"[2] "to pay as remitted for;"[3] "to pay when cargo of equal value is consigned to me;"[4] "payable when house is ready for acceptance;"[5] "accepted payable on giving up a bill of lading;"[6] "acceptance payable at a different time from that named in the bill;"[7] "payable at a different place from that named in the bill."[8]

It has been held in England that, in the absence of statutory regulations, an acceptance payable at a particular place, when the bill did not specify any place, was a conditional acceptance, because the bill was not payable anywhere else;[9] but in the United States, it has been generally held that such an acceptance is not a conditional acceptance, beyond the necessity of presenting the bill at the place named, to save costs and interest, unless it is expressly provided that the bill shall be payable at no

[1] See Newhall *v.* Clark, 3 Cush. 376; Kemble *v.* Lull, 3 McLean, 272; Crowell *v.* Plant, 53 Mo. 145.

[2] Smith *v.* Abbott, 2 Stra. 1152.

[3] Banbury *v.* Bassett, 2 Stra. 1211.

[4] Mason *v.* Hunt, 2 Doug. 297.

[5] Cook *v.* Wolfendale, 105 Mass. 401.

[6] Smith *v.* Vertue, 30 L. J. C. P. 56; 9 C. B. (99 E. C. L. R.) 214.

[7] Green *v.* Raymond, 9 Neb. 295; Wylie *v.* Bryce, 70 N. C. 425; Russell *v.* Phillips, 14 Q. B. 891; Clarke *v.* Gordon, 3 Rich. 311.

[8] Niagara Bank *v.* Fairman Co., 31 Barb. 403.

[9] Rowe *v.* Young, 2 Brod. & Bing. 165; 2 Bligh, 391. It is now changed by statute, 1 and 2 Geo. IV., so that it does not constitute a conditional acceptance, unless it is expressly stated to be payable at a particular place and nowhere else. Halstead *v.* Skelton, 5 Ad. & El. 86.

other place.[1] A bill, addressed to a drawee generally, may be accepted payable at a particular bank, without making it a conditional or qualified acceptance of such a character as to require the consent of the drawer and indorsers.[2]

An acceptance payable "when in funds," or in words of similar import, makes the drawee liable only when he is in possession of funds, which he is authorized to apply towards the payment of the bill.[3] If the funds are not received before the death of the acceptor, but are received

[1] Wallace *v.* McConnell, 13 Pet. 136; Foden *v.* Sharp, 4 Johns. 183; Blair *v.* Bank of Tenn., 11 Humph. 84. See Cox *v.* National Bank, 100 U. S. 714; Yeaton *v.* Berney, 62 Ill. 61; Schoharie Co. Nat. Bank *v.* Bevard, 51 Iowa, 258; Baltzer *v.* Kansas P. R. R. Co., 3 Mo. App. 574; Armistead *v.* Armistead, 10 Leigh, 525; Ruggles *v.* Patten, 8 Mass. 480; Caldwell *v.* Cassidy, 8 Cow. 271; Hills *v.* Place, 48 N. Y. 520; Thiel *v.* Conrad, 21 La. Ann. 214; Renshaw *v.* Richards, 30 La. Ann. 398; McNairy *v.* Bell, 1 Yerg. 502; McCulloch *v.* Cook, 34 Ind. 334; Reeve *v.* Pack, 6 Mich. 240; Howard *v.* Bowman, 17 Wis. 459. Professor Parsons says (1 Parsons' N. & B. 309, 310, 311): "If a bill were accepted 'payable only at such a place,' it would be so entirely conditional under the English statutes, that, if not demanded there, the acceptor would not be liable at all. We think this should be the rule in the United States, on the ground that such words are equivalent to 'accepted, provided that,' or 'on condition that;' but it is not certain that a bill accepted with the word 'only' or possibly with express words of condition, might not be held by some courts as binding the acceptor to the amount of the bill, but discharging him from interest and costs, if he had funds at the proper place at the maturity of the bill, by which it would then and there have been paid. For a full discussion of the effect of such acceptances, in respect to presentment for payment, see *post*, chapter on Presentment for Payment.

[2] Troy City Bank *v.* Lauman, 19 N. Y. 477; Niagara Bank *v.* Fairman Co., 31 Barb. 403; Meyers *v.* Standart, 11 Ohio St. 29.

[3] Marshall *v.* Clary, 44 Ga. 513; Browne *v.* Coit, 1 McCord, 408; Wintermute *v.* Post, 4 Bab. 420; Owen *v.* Iglanor, 4 Cold. 15; Hunter *v.* Ingraham, 1 Strob. 271; Stevens *v.* Androscoggin Water Power Co., 62 Me. 498; Perry *v.* Harrington, 2 Met. 368; Ray *v.* Faulkner, 73 Ill. 469. "Funds" means "cash," and he will consequently not be liable on his acceptance, if he should have available securities out of which money may be realized, until the money has been actually realized. Campbell *v.* Pettingill, 7 Greenl. 126; Carlisle *v.* Hooks, 7 Me. 129.

by his personal representative after his death, the personal representative will be bound by the acceptance.[1] In the same manner, the drawer cannot be sued on the bill, until the drawee has refused payment after he has been in receipt of funds.[2]

Wherever the terms of the condition are ambiguous and uncertain of meaning, parol evidence is admissible to explain the meaning of the terms.[3]

It is necessary, in a suit against the drawer, to aver and prove that he had known and had given his consent to the conditional acceptance.[4] And in all suits upon bills accepted conditionally, it is incumbent upon the holder to prove the performance of the condition;[5] but when the condition is not incorporated into the written acceptance, and appears in a separate paper, the burden of proving the condition is upon the acceptor.[6]

§ 228. **Acceptances for honor, or supra protest.** — Another kind of conditional acceptance, which deserves a separate consideration on account of distinguishing characteristics, is the acceptance for honor, or *supra protest*. When the drawee or drawees, named in the bill, have

[1] Galley *v.* Prindle, 14 Barb. 186; Swansey *v.* Breck, 10 Ala. 533; Owen *v.* Iglanor, 4 Cold. 15.

[2] Campbell *v.* Pettingill, 7 Greenl. 126; Knox *v.* Reeside, 1 Miles, 294; Gallery *v.* Prindle, 14 Barb. 186; Andrews *v.* Baggs, Minor, 173.

[3] Gallagher *v.* Black, 44 Me. 99, Swan *v.* Cox, 1 Marsh. 179; Lamon *v.* French, 25 Wis. 37; Shackleford *v.* Hooker, 54 Miss. 716; U. S. *v.* Bank of Metropolis, 15 Pet. 377.

[4] Taylor *v.* Newman, 77 Mo. 257.

[5] Andrews *v.* Baggs, Minor, 173; Knox *v.* Reeside, 1 Miles, 294; Atkinson *v.* Manks, 1 Cow. 691; Owen *v.* Lavine, 14 Ark. 389; Read *v.* Wilkinson, 2 Wash. C. C. 514; First Nat. Bank *v.* Bensley, 2 Fed. Rep. 609; Marshall *v.* Clary, 44 Ga. 511; Nagle *v.* Homer, 8 Cal. 353; Ford *v.* Angelrodt, 37 Mo. 50.

[6] Thomas *v.* Bishop, Cas. Temp. Hardw. 1; Clarke *v.* Cocke, 4 East, 57; Mason *v.* Hunt, Dougl. 296; Kaines *v.* Knightly, Skin. 54; Bowerbank *v.* Monteiro, 4 Taunt. 846, 37 Mo. 50.

refused to accept and the bill has been protested for non-acceptance, and notice given to all the parties to the bill, any third person may accept it for the honor of one or more of the parties to the bill.[1] But there can be no acceptance for honor, until there has been a presentment to the original drawee, and notice and protest of non-acceptance. For this reason the acceptance for honor is sometimes called acceptance *supra protest*. This acceptance enures to the benefit of all the parties for whose honor the bill was accepted.[2] Although there can not be successive acceptors before protest, there may be as many acceptors for honor, as there are parties to the bill; for example, one may accept for the honor of the drawee, another for the honor of the drawer, another for the first indorser, another for the second indorser, etc.[3] But one may accept for the honor of two or more, and even all, of the parties; and in his acceptance it should be stated for whose honor it is given.[4] If it is not stated for whose honor the bill has been accepted, it is presumed to have been accepted for the honor of the drawer.[5]

The holder is not bound to take an acceptance for

[1] The original drawee may himself accept for honor of one of the parties, if he should not care to accept for the whole bill. But that is only possible, when the drawee is under no obligation to accept. If he is under such an obligation, he cannot change it by refusing to accept in the first instance, and then accepting for honor. Schimmelpennich *v.* Bayard, 1 Pet. 264; Story on Bills, § 259.

[2] Hussey *v.* Jacob, 1 Ld. Raym. 88; Ex parte Wackerbath, 5 Ves. 574; Jackson *v.* Hudson, 2 Campb. 447; Davis *v.* Clarke, 6 Q. B. 16; Jenkins *v.* Hutchinson, 13 Q. B. 744; Eastwood *v.* Bain, 3 H. & N. 738; Hoare *v.* Cazenove, 16 East, 391; Konig *v.* Bayard, 1 Pet. 250; May *v.* Kelley, 27 Ala. 497; Markham *v.* Hazen, 48 Ga. 570; Walton *v.* Williams, 44 Ala. 347.

[3] Chitty on Bills, 375; 1 Parsons' N. & B. 315; Jackson *v.* Hudson, 2 Camp. 447; Byles on Bills, [*255] 403.

[4] Hussey *v.* Jacob, 1 Ld. Raym. 88; Lewin *v.* Brunette, 1 Lutw. 896; Gazzam *v.* Armstrong, 3 Dana 552; 1 Parsons' N. & B. 313.

[5] Chitty on Bills, [*346] 387; 1 Parsons' N. & B. 313.

honor;[1] but if he does, he can not sue any of the parties, for whose honor the bill had been accepted, until it has matured and payment has been refused by the acceptor for honor.[2]

In order to make a proper acceptance for honor, the acceptor must appear before a notary public, declare his intention to accept for the honor of some one or more of the parties to the bill, and subscribe his name to some such words as "accepted *supra protest* for the honor of A."[3]

The acceptance for honor is not absolute. As already stated, it is a conditional acceptance; and the acceptor is only liable when all the implied conditions have been performed.[4] In order to make such an acceptor liable, the bill must be again presented to the drawee at maturity, notwithstanding his refusal to accept, so that he might pay the bill, if he saw reasons for changing his previous determination.[5] If he refused, the bill should be protested

[1] Gregory *v.* Walcup, 1 Comyns 76; Mitford *v.* Walcott, 12 Mod. 410; Ld. Raym. 575; Pillans *v.* Van Mierop, 3 Burr. 1663.

[2] Williams *v.* Germain, 7 B. & C. 468; 1 Man. & R. 394.

[3] Byles on Bills, [*265] 402; Chitty on Bills, [*346] 386; 1 Daniel's Negot. Inst., § 523. The form is sometimes, "Accepted, under protest, for honor of A. & B., and will be paid for their account, if regularly protested and refused when due." Mitchell *v.* Baring, 10 B. & C. 4; 4 C. & P. 35.

[4] Lord Tenterden says, such an acceptance "is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have your money.'" Williams *v.* Germaine, 7 B. & C. 457; 1 M. & R. 394.

[5] In Hoare *v.* Cazenove, 16 East, 391, Lord Ellenborough said: "It (the acceptance for honor) is an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor. * * * Indeed the reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill remains with the

for non-payment, and then presented to the acceptor for honor.[1] And if the acceptor for honor refused to pay the bill, it should be again protested, and in this protest, all the steps that had been taken to secure the payment of the bill should be stated, and then notice should be given to all the parties for whose honor the bill had been accepted.[2] If the bill is payable at a certain time after sight, and it is accepted for honor, the time runs from the day of the acceptance, and not from the date of presentment to the drawee.[3] In order that the acceptor may have recourse against the party for whose honor he has accepted, he must have notified such party of his acceptance for his honor, as well as of his payment of the bill, and these notices must be sent within a reasonable time thereafter.[4] The acceptor then has recourse against the parties for whose honor he accepts, and all those who are liable to these parties.[5]

But he will have no recourse against any other of the parties, such as subsequent indorsers. If he accepts for the honor of the drawer, he will have recourse only against him; and if he accepts for the honor of an indorser, he

holder; for effects often reach the drawee who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again, when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort." If this second presentment is omitted, it will discharge the acceptor for honor, as well as all the parties for whose honor he had accepted. Story on Bills, § 261; Schofield *v.* Bayard, 3 Wend. 488; Barry *v.* Clark, 19 Pick. 220.

[1] Story on Bills, § 261; Chitty on Bills, [*348, 350, 351] 389, 390, 392.

[2] Chitty on Bills, [*352] 393; 1 Parsons' N. & B. 320.

[3] Williams *v.* Germaine, 7 B. & C. 468; 1 M. & R. 394, 403.

[4] Story on Bills, § 259; 1 Daniel's Negot. Inst., § 523; Barry *v.* Clark, 19 Pick. 220; Schofield *v.* Bayard, 3 Wend. 488; Wood *v.* Pugh, 7 Ohio, pt. II., 156.

[5] Goodall *v.* Polkill, 1 C. B. 233; 1 Daniel's Negot. Inst., § 526.

will have recourse against the drawer and all prior indorsers, but not against a subsequent indorser.[1]

§ 229. **Protest for better security.** — Another kind of acceptance for honor is that which is given in consequence of a protest for better security. It is very uncommon, but it is feasible, if resorted to, in any part of England or of the United States. Whenever the acceptor absconds or becomes bankrupt before the maturity of the bill, the holder can protest the bill at once for better security, and if the drawer and indorsers choose to do so, they may furnish additional security, in the way of a second acceptance or guaranty.[2]

§ 230. **What acceptance admits.** — In accepting a bill the drawee admits the genuineness of the drawer's signa-

[1] "We are decidedly of the opinion that he (the acceptor for honor) acquired no demand, or right of action, against any party subsequent to the one for whom he made the payment, and that, even as against the preceding parties, he was only substituted to the rights of that party in the same condition as if he paid the bill himself." Marshall, J., in Gazzam *v.* Armstrong, 3 Dana, 554.

[2] Mr. Chitty says: "The custom of merchants is stated to be, that if the drawee of a bill of exchange abscond before the day when the bill is due, the holder may protest it, in order to have better security for the payment, and should give notice to the drawer and indorsers of the absconding of the drawee; and if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also, in such case, protest for better security; but the acceptor is not, on account of the bankruptcy of the drawee, compellable to give this security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers; and its principal use appears to be that, by giving notice to the drawers and indorsers of the situation of the acceptor, by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due, and thereby prevent the loss of re-exchange, etc., occasioned by the return of the bill. It may be recollected that, though the drawer or indorsers refuse to give better security, the holder must, nevertheless, wait till the bill be due before he can sue either of those parties." Chitty on Bills, [*344] 385. See also Ex parte Wackerbath, 5 Ves. 574.

ture, for he is presumed to know the signature of one who calls on him to pay out money for him, and he is therefore estopped from showing, in any action against him, that the drawer's signature was a forgery.[1] And the acceptance admits the agent's signature and authority to sign for the drawer, where the bill was drawn by procuration.[2] But it has been claimed in a late case, with much show of reason therefor, that the drawee is only estopped from denying the agent's signature and authority, in any action by a *bona fide* transferee; and that the estoppel does not apply to actions by the original payee.[3]

[1] Wilkinson *v.* Lutwidge, 1 Strange, 648; Jenys *v.* Fawler, 2 Stra. 946; Smith *v.* Chester, 1 T. R. 654; Leach *v.* Buchanan, 4 Esp. 226; Price *v.* Neal, 3 Burr. 1354; Sanderson *v.* Coleman, 4 Man. & G. 209; Wilkinson *v.* Johnson, 3 B. & C. 428; Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333; Hortsman *v.* Henshaw, 11 How. 177; Hoffman & Co. *v.* Milwaukee, 12 Wall. 193; Bank of Commerce *v.* Union Bank, 3 Comst. 235; Goddard *v.* Merchants' Bank, 4 Comst. 147; Nat. Park Bank *v.* 9th Nat. Bank, 46 N. Y. 77; White *v.* Continental Nat. Bank, 64 N. Y. 316; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Levy *v.* Bank of U. S., 1 Binn. 27; Ellis *v.* Ohio Life, etc., Ins. Co., 4 Ohio St. 628; Whitney *v.* Bunnell, 8 La. Ann. 429; Peoria R. R. Co. *v.* Neill, 16 Ill. 269; Angel *v.* Ellis, 1 McGloin, 57.

[2] Robinson *v.* Yarrow, 7 Taunt. 445; 1 Moore, 150; Chitty on Bills, [*639] 717; 1 Parsons' N. & B. 322; 1 Daniel's Negot. Inst., § 537.

[3] Agnel *v.* Ellis, 1 McGloin 57, McGloin, J., saying: "A party accepting a commercial negotiable draft or bill of exchange, guarantees the authority of the drawer to execute the same and the genuineness of his signature. This principle has been held applicable to such an instrument drawn by an agent, and the authority of the agent declared to be amongst the things guaranteed by the acceptance. Robinson *v.* Yarrow, 7 Taunt. 445. There is really no reason why, in the hands of an innocent holder, the guarantee should not extend so far. But as one who received a draft from a forger with notice, actual or legal, could not impose such guarantee upon the acceptor, and as one dealing with an agent must, at his peril, inquire into the scope of that agent's authority, and is negligent if he do not, it is reasonable to hold a person taking a draft, executed by a mandatary, as charged with knowledge as to the character and extent of the agency, and not protected by the acceptance, as an innocent person would be. And in view of this obligation upon the part of persons dealing primarily and directly with agents, the drawer has as much

The drawee also by acceptance admits that he has in his possession funds of the drawer, wherewith to pay the draft, and he is not permitted to deny this fact in any suit by the holder of the bill.[1] But as against the drawer, it is only *prima facie* evidence that the drawee had such funds in his possession, and it may be rebutted by any proper testimony.[2] The drawee's acceptance admits likewise the drawer's capacity to draw the bill, so that he will be estopped from proving, for the purpose of defeating the bill, that the drawer was under a legal disability because of infancy,[3] or bankruptcy,[4] or for any other reason.[5] If the bill is drawn in the name of a firm, it admits the existence of such a firm,[6] and if drawn by one, signing himself as executor or administrator, it admits his right to sign in that capacity.[7]

right, and perhaps more, to presume that the payee has performed his prior duty, and ascertained the extent of the agent's power before taking his draft, as the negligent payee has to suppose that the acceptor would not commit himself unless the draft were correct."

[1] Raborg *v.* Peyton, 2 Wheat. 385; Jarvis *v.* Wilson, 46 Conn. 90; Byrd *v.* Bertrand, 7 Ark. 327; Hortsman *v.* Henshaw, 11 How. 177; Eastin *v.* Succession of Osborn, 26 La. Ann. 153; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Kennedy *v.* Galvin, 15 Me. 131; Gillilan *v.* Meyers, 31 Ill. 525; Kemble *v.* Lull, 3 McLean, 272; Jarvis *v.* Wilson, 46 Conn. 90; Jordan *v.* Tarkington, 4 Dev. 357; Marsh *v.* Low, 55 Ind. 271; Byrne *v.* Schwing, 6 B. Mon. 199.

[2] Darnell *v.* Williams, 2 Stark. 145; Parker *v.* Lewis, 39 Tex. 394; Turner *v.* Browder, 5 Bush, 216; Pomeroy *v.* Tanner, 70 N. Y. 547; Hidden *v.* Waldo, 55 N. Y. 294.

[3] Taylor *v.* Croker, 4 Esp. 187; Jones *v.* Darch, 4 Price, 300.

[4] Braithwaite *v.* Gardiner, 8 Q. B. 473; Pitt *v.* Chappelew, 8 M. & W. 616.

[5] Such as that the drawer was a married woman, Smith *v.* Marsack, 6 C. B. 486; Cowton *v.* Wickersham, 34 Pa. St. 302; or a fictitious person, Cooper *v.* Meyer, 10 B. & C. 468; 5 M. & R. 387; *s. c.* 33 L. J. Q. B. 328; Ashpittle *v.* Bryan, 32 L. J. Q. B. 91; 3 Best & S. 474; or a corporation, without authority to draw, Halifax *v.* Lyle, 3 W. H. & G. 446.

[6] Bass *v.* Clive, 4 M. & S. 13.

[7] Aspinwall *v.* Wake, 10 Bing. 51.

The acceptance, in the same manner, admits the capacity of the payee to indorse when the bill is drawn payable to his order, for by his acceptance he agrees to pay to the order of the payee. He cannot, therefore, set up the defense that the payee was incapacitated by law to indorse.[1]

But the acceptor does not admit the genuineness of the payee's signature, where the bill has been indorsed. If, therefore, the signature is forged, the acceptor will not be bound to pay the bill to the holder.[2] For the same reasons, he does not admit or vouch for the genuineness of an agent's indorsement or for his authority to indorse for the payee.[3] The acceptance does not admit the genuineness of the payee's indorsement, even when the bill is drawn payable to the drawer's order, and the indorsement appears in the handwriting of the drawer.[4] But if the drawer is a

[1] Jones *v.* Darch, 4 Price, 300; Taylor *v.* Croker, 4 Esp. 187; Smith *v.* Marsack, 6 C. B. 486; Draton *v.* Dale, 2 B. & C. 293. See Feaslee *v.* Robins, 3 Met. 164. See also *ante*, §§ 49, 56, 63, 65.

[2] "The plaintiffs as drawees of the bill were only held to acknowledge the signature of their correspondents; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any part of the instrument, or of any other names appearing thereon, or of the title of the holder." Allen, J., in White *v.* Continental Nat. Bank, 64 N. Y. 320; Holt *v.* Ross, 54 N. Y. 474; Williams *v.* Drexel, 14 Md. 566; Hortsman *v.* Henshaw, 11 How. 177; Tucker *v.* Robarts, 16 Q. B. 560; Smith *v.* Chester, 1 T. R. 654. If he has paid the bill on the faith of the genuineness of the payee's signature, he may recover the money back. Canal Bank *v.* Bank of Albany, 1 Hill, 287; Williams *v.* Drexel, 14 Md. 566; Dick *v.* Leverich, 11 La. 573.

[3] Robinson *v.* Yarrow, 7 Taunt. 455, Park, J.: "The mere acceptance proves the drawing, but it never proves the indorsement; it is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration; the first is a power to get funds into the agent's hands, the other to pay them out. See also Prescott *v.* Flinn, 9 Bing. 19.

[4] Robinson *v.* Yarrow, 7 Taunt. 455; Garland *v.* Jacomb, L. R. 8 Exch. 216; Beeman *v.* Duck, 11 M. & W. 257; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Williams *v.* Drexel, 14 Md. 566. See *contra*, Burgess *v.* Northern Bank, 4 Bush, 600.

fictitious person, and the bill is made payable to the drawer's order, the acceptor is bound to pay to the order of the person who drew the bill.[1]

Again, the acceptor does not admit the genuineness of the body of the bill, so that if the terms have been altered, without authority, the acceptor is not bound by them, and can refuse to pay the altered bill.[2] And if he has paid the bill according to its altered terms, he could recover back the excess over the original amount of the bill,[3] unless the alteration was rendered possible by the negligence of the drawer; in such a case the acceptor would be bound for the whole amount, and could not recover back any part of it, since the drawer would be bound for the whole amount to him.[4] The same rule prevails when the drawer alters the bill himself or acquiesces in its alteration.[5]

§ 231. **The admissions of acceptor for honor.** — According to some of the authorities, the acceptor for honor does not admit the genuineness of the signatures to the bill, not even the signature of the person for whose honor he has accepted. The principal ground for this opinion is that the acceptance for honor is an extraordinary proceeding, and not a matter of course in trade; and the admissions being required only for commercial convenience, they should not apply to the unusual acceptance for honor, which can occur only after the bill has been dishonored, and the commercial world has been put on its guard.[6] But while we incline to this

[1] Cooper *v.* Meyer, 10 B. & C. 468; Beeman *v.* Duck, 11 M. & W. 251.

[2] Young *v.* Grote, 4 Bing. 253; Hall *v.* Fuller, 5 B. & C. 750; Marine Nat. Bank *v.* Nat. City Bank, 59 N. Y. 67; White *v.* Continental Nat. Bank, 64 N. Y. 320; Young *v.* Lehman, 63 Ala. 519; Espy *v.* Bank of Cincinnati, 18 Wall. 604. See *post*, chapter on Forgery.

[3] Bank of Commerce *v.* Union Bank, 3 Comst. 230. See *post*, chapter on Forgery, in respect to effect of forgery.

[4] Van Duzer *v.* Howe, 21 N. Y. 531.

[5] Langton *v.* Lazarus, 5 M. & W. 628; Ward *v.* Allen, 2 Met. 57.

[6] 1 Parsons' N. & B. 323. In Wilkinson *v.* Johnson, 3 B. & C. 428,

opinion, it must be admitted that the opposite view, taken by some of the authorities, is not without reason, and that the point is at best a very doubtful one.[1]

It has also been held that the acceptor for honor is free from admissions, only when he accepts for an indorser; and that when he accepts for the honor of the drawer, he admits that the bill is valid, and is estopped from denying its validity.[2] And it seems that he is estopped in any case

Lord Tenterden said: "A bill is carried for payment to the person whose name appears as acceptor, or as agent for an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent for whose honor the payment is asked, is actually on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own; but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the *quantum;* yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may by his own prior mistake have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, while the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches."

[1] "Why, indeed, the acceptor *supra protest* should not be bound by the same rules which apply to an ordinary acceptor in the usual course of business we cannot perceive. It is his own voluntary act, and unless he has been imposed upon by the holder of the bill to such an extent as to warrant a defense on the distinct ground of fraud, he should, we think, be held up to the strict performance of his engagement, and estopped from denying any fact — such as the validity of the signatures of parties — which it presupposes." 1 Daniel's Negot. Inst., § 528; Byles on Bills, [*265] 406.

[2] In Phillips *v.* Thurn, 18 C. B. (N. S.) 694, the payee was a fictitious

from setting up the defense of forgery in an action brought by a *bona fide* transferee of the bill.[1]

§ 232. **How acceptor's liability may be waived.** — Payment or a release will extinguish the acceptor's liability. They will be considered elsewhere.[2] It is proposed to discuss here, when and under what circumstances the acceptor's liability may be discharged by a waiver. It is a general rule of law that an executory contract may before breach be discharged by the mutual agreement of the parties to waive their respective rights under the contract; and this agreement may be written or verbal. But after a breach of the contract it can only be discharged by payment, or by a renunciation based upon some valuable consideration, offered in place of the rights under the contract.[3] But it is claimed that the bills of exchange constitute an exception to this general rule, and the acceptor may be discharged by an express renunciation of his obligation, without consideration. Not only is this held to be the case, where the acceptance was for the accommodation of the drawer,[4] but also where the acceptor had funds of the

person, and Erle, C. J., said: "I take it to be clear, that if the defendant had not intervened and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer. * * * It seems to me that there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think that he is equally bound to admit that the bill is a valid bill."

[1] Story on Bills, § 262; 1 Daniel's Negot. Inst., § 528; Salt Springs Bank *v.* Syracuse Sav. Inst., 62 Barb. 101.

[2] See *post*, chapter on Payment.

[3] Story on Bills, § 266; 1 Parsons' N. & B. 324; Foster *v.* Dawber, 6 Exch. 850; Dobson *v.* Espie, 26 L. J. (N. S.) 240; Byles on Bills, [*196, 197] 308, 309.

[4] Whatley *v.* Tricker, 1 Camp. 35; Story on Bills, § 266; 1 Parsons' N. & B. 324; Chitty on Bills, [*311] 350.

drawer, against which the bill had been drawn.[1] But the language of the English author is broader than the authorities warrant to be used in stating the existing law on this question. Whatever may be the prevalent rule in foreign countries, not only in most of the cited cases is the waiver or renunciation of the acceptance acknowledged to be supported by a sufficient consideration;[2] but the law writers

[1] Walpole *v.* Pulteney, cited in Dingwall *v.* Dunster, 1 Dougl. 248; Wintermute *v.* Post, 4 N. J. 420; Farquhar *v.* Southey, 2 C. & P. 497; Parker *v.* Leigh, 2 Stark. 228. "It is a general rule of law that a simple contract may, before breach, be waived or discharged, without a deed, and without a consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration. To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability of the acceptor, or other party, remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder without consideration. The exception seems at first to violate a fundamental rule, but the reason may be that a distinction between a release under seal, and a release not under seal, is quite unknown in foreign countries. An express and complete renunciation by the holder of his claim on any party to the bill, is, therefore, according to the law merchant equivalent to a release under seal. And as it would be highly inconvenient to introduce nice distinctions and nice questions of international law, all the contracts on a foreign bill, though negotiated or made in England, and all the contracts on an inland bill, depending, as they do, on the same law merchant, may be so released. And such a relaxation of the general rule in the case of bills of exchange is not unreasonable on another ground. The money due at the maturity of a bill of exchange is in practice expected to be paid immediately, and in many cases with remedies over in favor of the debtor. Parties liable who are expressly told that recourse will not, in any event, be had to them, are almost sure, in consequence, to alter their conduct and position." Byles on Bills, [*196, 197] 308, 309.

[2] In Whatley *v.* Tricker, 1 Camp 35, the acceptor parted with some property of the drawer, in reliance upon his release from liability. See also Parker *v.* Leigh, 2 Stark. 228; Badnall *v.* Samuel, 3 Price, 521; Perfect *v.* Musgrave, 6 Price, 111; Walpole *v.* Pulteney, cited in 1 Dougl. 248. In Wintermute *v.* Post, 4 N. J. 420, Haines, J., said: "That a parol waiver is lawful, and will discharge the acceptor, there can be no doubt, and the court was correct in charging the jury, that if, in their opinion, the circumstances and the conduct of the plaintiff induced the defendant to believe that no further resort would be had to him, it was a

also, with the exception of Mr. Byles, recognize the necessity of a consideration of some sort to support a waiver.[1] It is probably true that no case of a renunciation of the acceptance can arise where a subsequent enforcement of the acceptor's liability would not work an injury in parting with the funds or other property of the drawer, or in failing to take the steps necessary for his protection, because of his reliance upon the release of his liability. But the principle must not be lost sight of, that here, as well as elsewhere in

waiver. If the plaintiff induced the defendant fairly to suppose that he would look to the drawer, and not to him, he thereby relieved the defendant from any further care to secure funds in his hands to meet the draft, and relinquished to the defendant any liability that resulted from the acceptance. And whether he did so waive the liability of the defendant, was a question of fact properly submitted to the jury."

[1] "Where the renunciation is clear, and the intention to discharge unquestionable, there, if there be a sufficient consideration, or an act done on the part of the acceptor, which might not otherwise have been done, which affects his interest, the acceptor will be discharged." Story on Bills, § 266. "Whether such waiver or renunciation, however absolute, would be valid if without consideration, may be doubted. There is, or seems to be, some authority for it. But it is certain that it must have full force and effect where it has induced the acceptor to do any act which would be injurious to him if the obligation were afterwards insisted on. We think that a waiver operates by estoppel rather than by contract, and we should therefore state the rule thus. Any renunciation founded upon a valid consideration, or acted upon in good faith by the acceptor, so as to put him in a worse situation than if this renunciation had not been made; or any act of the holder authorizing the acceptor to believe that the holder had renounced all claim upon him, which belief was acted upon by the acceptor, discharges him." 1 Parsons' N. & B. 320, 321. "The acceptor enters into his engagement with funds of the drawer in his hands, or under some business arrangement according to his course of dealing, and if the holder expressly renounces claim against him, his hands are then untied, and he is left free to account to the drawee for the funds in his hands, or at least is no longer bound to appropriate them to the payment of the bill, or to carry out the arrangements contemplated for its payment. To permit the holder, after thus exonerating the acceptor, to recur to him for payment, would work in many cases the harshest injustice, and he is estopped from doing so." 1 Daniel's Negot. Inst. §544.

the law of contracts, a consideration is necessary to make a waiver or release valid. There is, then, in fact no difference between bills of exchange and other contracts in respect to the requisites of a legal waiver.[1]

In order that the renunciation of the acceptor's liability may be binding upon the holder and may release the acceptor, it must be absolute and unconditional. There is no discharge where the waiver is conditional.[2] And, although it has been held that the waiver must be express,[3] yet it is probable that the courts cannot be said to have gone further than requiring that the fact of renunciation must be made clear, and that it may be implied from the circum-

[1] Judge Sharswood, in a note to Byles on Bills, p. 310, after quoting from Judge Story on this subject (see quotation in preceding note), says: "There can be no hesitation in assenting to this statement of the law. But there is nothing peculiar in this doctrine to bills of exchange. It is the application only of principles well settled in all other classes of contracts. It is to be observed, also, that bills or notes are not within the rule that simple contracts may be discharged by parol before breach; it would be more accurately expressed, to say that executory contracts may be discharged or varied by parol before breach, and then I am not aware of any principle or cases which would confine it to simple contracts. If A. agreed to build a house for B., or to sell him certain materials, whether by articles under seal or not, A. and B. may before breach vary such agreement by parol. But if the consideration on either side is executed, or just so far as it is executed, it is no longer an executory but an executed contract, and an accord without satisfaction is no bar. A bond, a bill, a note, the price to be paid for making a coat, building a house, or selling a barrel of flour, if the service has been performed, or the merchandize, though a credit is given, are *debita in presenti, solvenda in futuro*, and cannot be released, unless by an instrument under seal, or an agreement founded upon sufficient consideration." It may be added that there is even no difference, in respect to requiring a consideration for a release or waiver, between executory and executed contract, except in respect to the kind of consideration. As long as the contract is executory, the release of the rights under the contract of one party constitutes the consideration for the release of the other party's rights.

[2] Whatley *v.* Tricker, 1 Camp. 35; Story on Bills, § 266; 1 Parsons' N. & B. 324.

[3] Dingwall *v.* Dunster, 1 Dougl. 247; 13 East, 430.

stances.[1] It will be implied from a cancellation of the acceptance, where it was done by the holder or by his authority,[2] but not when done without his consent or by mistake.[3] But the acceptor will not be discharged merely because the holder has delayed to proceed against him,[4] or has received interest from the drawer or indorser,[5] or has given them an extension of time or taken security from them.[6]

[1] 1 Daniel's Negot. Inst., § 545; Farquhar *v.* Southey, 2 C. & P. 497; Parker *v.* Leigh, 2 Stark. 228; Wintermute *v.* Post, 4 N. J. 420.

[2] Sproat *v.* Matthews, 1 T. R. 182; Bentinck *v.* Dorrien, 6 East, 199; 1 Parsons' N. & B. 328.

[3] Wilkinson *v.* Johnson, 3 B. & C. 428; Novelli *v.* Rossi, 2 B. & Ad. 757; Raper *v.* Birkbeck, 15 East, 17. It is a question for the jury to determine whether the cancellation was intentional or unintentional, with or without the holder's consent. Sweeting *v.* Halse, 9 B. & C. (17 Eng. C. L. R.) 365; 4 Man. & R. 287.

[4] Anderson *v.* Cleveland, 13 East, 430.

[5] Farquhar *v.* Southey, 2 C. & P. 497; Moody & M. 14; Dingwall *v.* Dunster, 1 Doug. 247.

[6] Story on Bills, § 268; Dingwall *v.* Dunster, 1 Doug. 247; Ellis *v.* Galindo, 1 Doug. 250, note; Farquhar *v.* Southey, 2 C. & P. 497. In Laxton *v.* Peate, 2 Camp. 185, it was held by Lord Ellenborough that where it was an accommodation acceptance, the aceptance was discharged by taking interest or security from the drawer, or by giving an extension of time to him, since the acceptor in that case is but a surety of the drawer. But in Fentum *v.* Pocock, 5 Taunt. 192, 1 Marsh. 14, Lord Mansfield repudiated the doctrine laid down by Lord Ellenborough, saying: "As it appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value, or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release." The doctrine of Fentum *v.* Pocock, has been followed in England in Price *v.* Edmunds, 10 B. & C. 578; Yallop *v.* Ebers, 1 B. & Ad. 698; Strong *v.* Foster, 17 C. B. 201; Angell *v.* Ohler, 5 M. & W. 600; Charles *v.* Marsden, 1 Taunt. 224; Carstairs *v.* Rolleston, 5 Taunt. 551; Smith *v.* Knox, 3 Esp. 46; Mallet *v.* Thompson, 5 Esp. 178; and in the United States, in Farmers, etc., Bank *v.* Rathbone, 26 Vt. 19; Murray *v.* Judah, 6 Cow. 484; Bank of Montgomery Co. *v.* Walker, 9 S. & R. 229; Walker *v.* Bank of Montgomery Co., 12 S. & R. 382; Clopper *v.* Union Bank, 7 Harr. & J. 92; Yates *v.* Donaldson, 5 Md. 389; Hansbrough *v.* Gray, 3 Gratt. 356; Lambert *v.* Sandford, 2 Blackf. 137; Cronise *v.* Kel-

§ 233. **Certified notes.** — There cannot, of course, be any regular acceptance of a promissory note. But a custom has prevailed more or less in the banking business, whenever a note is made payable at a particular bank, to take the note to the bank, and to secure from the bank officials a certificate that the note is good. This certificate amounts to a guaranty that the bank has the funds wherewith to pay the note, and imposes upon the bank an absolute obligation to pay.[1] But the certification of a promissory note does not prevent the certifying bank from taking up the note as an indorsee for value, and holding the maker and indorsers liable to it on the note.[2]

§ 234. **Certified checks.** — Checks may also be certified to by the bank on which they are drawn, and the bank thus become liable on them, like the acceptor of a bill of exchange. But as the distinguishing characteristics of checks are to receive separate treatment in another chapter[3] the subject of certified checks will not be discussed in this connection.[4]

logg, 20 Ill. 11; Diversy *v.* Moor, 22 Ill. 330. See also Pickering *v.* Marsh, 7 N. & H. 192; Church *v.* Barlow, 9 Pick. 547; Commercial Bank *v.* Cunningham, 24 Pick. 270; Grant *v.* Ellicott, 7 Wend. 227; Lord *v.* Ocean Bank, 20 Pa. St. 384.

[1] "The presentation of the note at the counter of the bank, on its maturity, for payment, was in the ordinary course of business and so was the certificate then and there indorsed by the teller, certifying that the same was good. The legal effect and force of such certificate was, that the maker had deposited funds in the bank to meet the note; and that the bank then held the same in deposit for that purpose; and would pay the amount upon request. * * * The indorsement was, in effect, an absolute engagement on the part of the bank to pay the note, and dispense with protest, or steps to charge the indorser, as much so as if the defendant had actually received the cash on the presentation of the note, instead of taking the certificate of the teller that the note was good." Mead *v.* Merchants' Bank, 25 N. Y. 148

[2] Irving Bank *v.* Wetherall, 36 N. Y. 337.

[3] See *post*, chap. XXIII.

[4] See *post*, §§ 436–439.

CHAPTER XII.

THE TRANSFER OF COMMERCIAL PAPER IN GENERAL.

SECTION 241. The assignability of choses in action in general.
242. Transfer of non-negotiable paper — Subject to what defenses.
243. Negotiable instruments payable to bearer, — how transferred.
244. The liability of assignors of instruments payable to bearer.
245. Liability of broker in transfer of negotiable paper by delivery.
246. The transfer of negotiable paper payable to order — Indorsement.
247. Assignment of negotiable paper payable to order.
248. Effect of a subsequent indorsement, — whether it relates back.
249. Equitable or implied assignment of negotiable paper.
250. Title to commercial paper passes by sale without delivery.
251. Transfer by legal process.
252. Transfer by *donatio mortis causa*.

§ 241. The assignability of choses in action in general. — It is a well known rule of the common law that *choses in action* cannot be assigned, so as to enable the assignee to maintain an action upon it; and such is the rule of law in all common-law countries, where it has not been changed by statute or judicial legislation.[1] The reason as-

[1] Hay *v.* Green, 12 Cush. 282; Orr *v.* Amory, 11 Mass. 25; Usher *v.* D'Wolf, 13 Mass. 290; Boston Ice Co. *v.* Potter, 123 Mass. 28; Hunt *v.* Mann, 132 Mass. 53, 55; Greenby *v.* Wilcocks, 2 Johns. 1; Gardner *v.* Adams, 12 Wend. 297; Robertson *v.* Reed, 11 Wright, 115; Dunklin *v.* Wilkins, 5 Ala. 199; Davis *v.* Herndon, 39 Miss. 484. The only other exception to this common-law rule, that prevailed at any early day, besides that in favor of negotiable paper, was the assignment of *choses in action* to and from the king. Bac. Abr. Prerogative E, 3; Miles *v.* Williams, 1 P. Wms. 249; 10 Mod. 243; Myles *v.* Williams, Gibb. Cas. 318;

signed for this prohibition was the prevention of the oppression of the masses, by the accumulation of *choses in action* in the hands of the few.[1] The court of chancery, at a very early day, recognized the public demand for the assignment of executory contracts, and held such assignments valid, permitting the assignees to bring an appropriate action in that court for the protection of their interests.[2] Yielding to the influence of the courts of equity, the common-law courts, at first not recognizing the assignee in any way whatever, acknowledged the assignment so far as to permit the assignee to enforce the contract by an action in the name of the assignor ; and the action was so far under the control of the assignee, that although the assignor was the nominal plaintiff, he could do nothing with the suit.[3] It was claimed that in the assignment was implied " a covenant that the assignee shall receive the money to his own use."[4] In very many of the States, now, this common-law rule has been completely abrogated, so that the assignee of any contracts, — with the exception of a few contracts whose assignment is absolutely prohibited,[5] — may sue in his own

Breverton's Case, 1 Dy. 30b. It is claimed that the same exception is to be recognized in this country, in favor of assignments to and from the governments, both State and Federal. United States *v.* Buford, 3 Pet. 12, 30.

[1] Lord Coke tells us, in Lampet's Case, 10 Rep. 48, " the great wisdom and policy of the sages and founders of our law have provided that no possibility, title, right, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terretenants, and the subversion of the due and equal execution of justice."

[2] Russell *v.* Clark, 7 Cranch, 69; Mechanics' Bank *v.* Seton, 1 Pet. 299; Story *v.* Livingston, 13 Pet. 359, 375; Mason *v.* York, etc., R. R. Co., 52 Me. 82; Hodges *v.* Saunders, 17 Pick. 470; Currier *v.* Howard, 14 Gray, 511; Frye *v.* Bank of Illinois, 5 Gilman, 332.

[3] Legh *v.* Legh, 1 B. & P. 447; Fay *v.* Guynon, 131 Mass. 31; McWilliams *v.* Webb, 32 Iowa, 577.

[4] Lord Holt in Caister *v.* Eccles, 1 Ld. Raym. 683

[5] Such as agreements, involving personal confidence, and the employ-

name. This is particularly the case in all the States in which the New York code has been adopted: for that code has provided that actions shall be brought always in the name of the real party in interest.

But before these modifications in the early common-law rule were brought about in favor of assignments of contracts in general, a custom grew up among merchants, which was recognized by the courts as valid and binding as law, to permit without restrictions of any kind, except in respect to the form of transfer, the assignment of certain instruments of indebtedness, known as bills of exchange and promissory notes.[1] In consequence of this exception, these instruments received the name of negotiable paper. What is negotiable paper has been explained in detail in a previous chapter,[2] and need not receive any further attention in this connection.

§ 242. **Transfer of non-negotiable paper — Subject to what defenses.** — In common with *choses in action* in general, the non-negotiable bill or note cannot be assigned at common-law in the name of the original payee.[3] But the assignment of non-negotiable paper, in common with

ment of personal skill, Robson *v.* Drummond, 2 B. & Ad. 303; Bethlehem *v.* Annis, 40 N. H. 34; Joslyn *v.* Parlin, 54 Vt. 670; Davis *v.* Coburn, 8 Mass. 299; Nickerson *v.* Howard, 19 Johns. 113; Handy *v.* Brown, 1 Cranch C. C. 610; Lansden *v.* McCarthy, 45 Mo. 106; Stringfield *v.* Heiskell, 2 Yerg. 546.

[1] See *ante*, chap. I, §§ 1–8.

[2] Chap. II.

[3] Costelo *v.* Crowell, 127 Mass. 293; Sanborn *v.* Little, 3 N. H. 539; Wiggins *v.* Damrell, 5 N. H. 69; Backus *v.* Danforth, 10 Conn. 297; Conine *v.* Junction, etc., R. R. Co., 3 Houst. 288; Johnson *v.* Speer, 92 Pa. St. 227; Pratt *v.* Thomas, 2 Hill, 654; Clark *v.* Farmers' Mfg. Co., 15 Wend. 236; Sutton *v.* Owen, 65 N. C. 123; Buckner *v.* Greenwood, 1 Eng. (Ark.) 200; Matlock *v.* Hendrickson, 1 Green (N. J.). 263; Prescott *v.* Hull, 17 Johns. 284; Skinner *v.* Somes, 14 Mass. 107; Amherst Academy *v.* Cowls, 6 Pick. 427; White *v.* Heylman, 34 Pa. St. 142.

almost all kinds of contracts, has always been recognized in equity; and in the court of equity the transferee of such paper may sue in his own name.[1] Unless the paper has all the qualities of negotiable paper as set forth in chapter II., it is non-negotiable; and the parties cannot make the paper transferable by making it payable in terms to the bearer or to the order of the payee.[2]

Another important difference between negotiable and non-negotiable paper is that the latter is transferred subject to all the defenses that may be set up against the original payee, whereas in the transfer of a negotiable instrument to an innocent holder for value, the latter takes it free from all the defenses, unknown to him, and not appearing on the face of the paper. In the transfer of non-negotiable instruments such defenses are admissible, even against a *bona fide* holder for value.[3]

The non-negotiable paper may be assigned in almost any manner or form. Although some sort of written assignment, either written on the instrument itself, or on a separate

[1] Coles *v.* Jones, 2 Vern. 692; Wright *v.* Wright, 1 Ves. sr. 411; Hughes *v.* Nelson, 29 N. J. 549; Halsey *v.* DeHart, Coxe (N. J.), 93; Maxwell *v.* Gundrum, 10 B. Mon. 286.

[2] Clark *v.* King, 2 Mass. 524; Coolidge *v.* Ruggles, 15 Mass. 387; Skinner *v.* Jones, 14 Mass. 107; Little *v.* Phœnix Bank, 7 Hill, 359; Legro *v.* Staples, 16 Me. 252; Weidler *v.* Kauffman, 14 Ohio, 455; People *v.* Gray, 23 Cal. 125; Jones *v.* Carter, 8 Q. B. 134.

[3] (Previous pledge of the paper) Cowdrey *v.* Vandenburgh, 101 U. S. 572; (want of consideration between original parties) Welter *v.* Kiley, 95 Pa. St. 461; (fraud) Bradford *v.* Williams, 91 N. C. 7; (previous attachment and garnishee process) Sharts *v.* Awalt, 73 Ind. 304. See also, generally, in support of the text, Willis *v.* Twombly, 13 Mass. 204; Bank *v.* Bynum, 84 N. C. 24; Dyer *v.* Homer, 22 Pick. 253; Sanborn *v.* Little, 3 N. B. 539; Wiggin *v.* Damrell, 4 N. H. 69; Thompson *v.* McClelland, 29 Pa. St. 475; White *v.* Heylman, 34 Pa. St. 142; Miller *v.* Bomberger, 76 Pa. St. 78; Havens *v.* Potts, 86 N. C. 31; Guerry *v.* Prettyman, 6 Ga. 119; Cohen *v.* Prater, 56 Ga. 203; Reddish *v.* Ritchie, 17 Fla. 867; Summers *v.* Hutson, 48 Ind. 228; Herod *v.* Snyder, 48 Ind. 480; Haskell *v.* Brown, 65 Ill. 29.

paper is usually employed, it is presumable that an oral assignment, accompanied by a delivery of the instrument, would pass a good title to the assignee: an equitable title where the common-law prohibition of assignment of *choses in action* still prevails; and a legal title, where it has been abrogated by statute.

§ 243. **Negotiable instruments payable to bearer — How transferred.** —It was once thought that bills and notes, payable to bearer, or payable to "A. or bearer," were not negotiable, for the reason that they contained no express authority to transfer.[1] But this position has long since been departed from, and instruments payable to bearer are held to be as much negotiable, as paper payable to order.[2] A note payable to the *holder* is also negotiable, the word *holder* being treated as synonymous with bearer.[3] But an instrument, payable "to the bearer, A." is not negotiable.[4]

Negotiable instruments, payable to bearer, are transferable by simple delivery, and the delivery of the instrument passes the complete legal title.[5] This is not only the case,

[1] Horton *v.* Coggs, 3 Lev. 299; Hodges *v.* Steward, 1 Salk. 125; Bradley *v.* Tramnel, Hempst. 164; Walmsley *v.* Child, 1 Ves. sr. 341; Nicholson *v.* Sedgwick, 1 Ld. Raym. 180.

[2] Grant *v.* Vaughn, 3 Burr. 1516; Shelden *v.* Hentley, 2 Show. 160; Hinton's Case, 2 Show. 235; Waynam *v.* Bend, 1 Campb. 175; Pierce *v.* Crafts, 12 Johns. 90; Dole *v.* Weeks, 4 Mass. 451; Ellis *v.* Wheeler, 3 Pick. 18; Wilbour *v.* Turner, 5 Pick. 526; Truesdell *v.* Thompson, 12 Met. 565; Eddy *v.* Bond, 19 Me. 461; Hutchings *v.* Low, 1 Green (N. J.), 246; Matthews *v.* Hall 1 Vt. 316; Rankin *v.* Woodworth, 2 Watts, 134; Dean *v.* Hall 17 Wend. 214; Allwood *v.* Haseldon, 2 Bailey, 457; Sprowl *v.* Simpkins, 3 Ala. 515; White *v.* Joy, 4 Ala. 571; Greeneaux *v.* Wheeler, 6 Tex. 515; Hopkins *v.* Seymour, 10 Tex. 202; Tillman *v.* Ailles, 5 Sm. & M. 373; Cobb *v.* Duke, 36 Miss. 60; Hathcock *v.* Owen, 44 Miss. 799; Avery *v.* Latimer, 14 Ohio, 542; Mainer *v.* Reynolds, 4 Greene (Iowa), 187.

[3] Putnam *v.* Crymes, 1 McMull. 9.

[4] Warren *v.* Scott, 32 Iowa, 22.

[5] Holcomb *v.* Beach, 112 Mass. 450; Lamb *v.* Matthews, 41 Vt. 42; Hutchings *v.* Low, 1 Green (N. J.), 246; Lyle *v.* Burke, 40 Mich. 499;

when the instrument is originally payable to bearer, but also, when a bill or note, originally payable to order, has become payable to bearer by a blank indorsement.[1] Instruments payable to a fictitious person are also treated as payable to bearer, at least as to *bona fide* holders.[2]

§ 244. **The liability of assignors of instruments payable to bearer.** — The liability of assignors of instruments payable to bearer is not so extensive as that of indorsers of negotiable paper, but they do assume certain liabilities by way of guaranty. The principal difference in the liability of such assignors and of indorsers is in the warranty of the solvency of the parties to the instrument and in the guaranty that the instrument will be honored at maturity. The assignor of a note or bill payable to bearer does not warrant the solvency of the parties to the bill, and is not responsible, if the instrument is not paid, unless he knew at the time of the transfer that the parties were insolvent, and the paper worthless. Some of the authorities hold that the loss, in case of insolvency, should fall upon the party who has possession of the instrument at the time when the insolvency occurred ; [3] but there are others which maintain that the loss should fall upon the person holding the paper when the insolvency becomes known to him, and if no pre-

Hall *v.* Allen, 37 Ind. 541; Woodruff *v.* King, 47 Wis. 261; Gillham *v.* State, 3 Ill. 245; Cobb *v.* Drake, 36 Miss. 60.

[1] Story on Notes, § 116; Watervliet Bank *v.* White, 1 Denio, 608. And the title will become reinvested in the indorser by a redelivery to him. Humphreyville *v.* Culver, 73 Ill. 485; Curtis *v.* Sprague, 51 Cal. 239.

[2] Foster *v.* Shattuck, 2 N. H. 446; Elliot *v.* Abbot, 12 N. H. 549; Maniort *v.* Roberts, 4 E. D. Smith, 83; Central Bank of Brooklyn *v.* Lang, 1 Bosw. 202.

[3] Wainwright *v.* Webster, 11 Vt. 576; Fogg *v.* Sawyer, 9 N. H. 365; Thomas *v.* Todd, 6 Hill, 340; Lightbody *v.* Ontario Bank, 11 Wend. 1; Roberts *v.* Fisher, 43 N. Y. 159; Harley *v.* Thornton, 2 Hill (S. C.), 509; Westfall *v.* Braley, 10 Ohio St. 188; Townsend *v.* Bank of Racine, 7 Wis. 185.

ceding holder knew of the insolvency the loss should fall upon the last holder.[1] But where the bill or note, payable to bearer, is delivered in payment of a pre-existing debt, but it was passed only as a conditional payment, conditional upon the payment of the bill or note, the subsequent dishonor of the bill or note revives the original indebtedness.[2] But if the payment was intended to be absolute, the loss from insolvency of the parties to the instrument will fall upon the transferee.[3]

Of course, if the transferer expressly guarantees the solvency of the parties, he is bound thereby, and it has been held that the statute of fraud does not apply to such guaranties, so that they will be binding if they are verbal.[4]

The assignor of an instrument, payable to bearer, does warrant that the signatures and the body of the instrument are genuine, so that if either proves to be a forgery, the money he received for the transfer can be recovered back.[5]

[1] Young *v.* Adams, 6 Mass. 182; Bicknall *v.* Waterman, 5 R. I. 43; Burgess *v.* Chapin, 5 R. I. 225; Bayard *v.* Shunk, 1 Watts & S. 92; Beckwith *v.* Farnum, 5 R. I. 230; Aldrich *v.* Jackson, 5 R. I. 228; Corbet *v.* Bank of Smyrna, 2 Har. 235; Edmonds *v.* Digges, 1 Gratt. 359; Fydell *v.* Clark, 1 Esp. 447; Emly *v.* Lye, 15 East, 7; Scruggs *v.* Cass, 8 Yerg. 175; Ware *v.* Street, 2 Head, 609; Bank of England *v.* Newman, 1 Ld. Raym. 442; Barton *v.* Trent, 3 Head, 167; Lowry *v.* Murrell, 2 Port. 282. See also Chitty on Bills, [*247] 281; Byles on Bills, [*158] 252.

[2] Marsh *v.* Pedder, 4 Camp. 257; Taylor *v.* Briggs, Moody & M. 28; Robinson *v.* Read, 9 B. & C. 449.

[3] Eagle Bank *v.* Smith, 5 Conn. 71; Limmins *v.* Gibbins, 18 Q. B. 722; *s. c.* 14 Eng. L. & Eq. 64. But see *contra*, Camridge *v.* Allenby, C. B. & C. 373.

[4] Milks *v.* Rich, 80 N. Y. 268; Cardell *v.* McNiel, 21 N. Y. 336; Bruce *v.* Burr, 67 N. Y. 237; Danber *v.* Blackney, 38 Barb. 432; Johnson *v.* Gilbert, 4 Hill, 178.

[5] Bell *v.* Dagg, 60 N. Y. 530; Aldrich *v.* Jackson, 5 R. I. 218; Swanzey *v.* Parker, 50 Pa. St. 441; Cabot Bank *v.* Morton, 4 Gray, 158; Coolidge *v.* Brigham, 1 Met. 547; *s. c.* 5 Met. 68; Worthington *v.* Cowles, 112 Mass. 30; Whitney *v.* National Bank, 45 N. Y. 305; Ross *v.* Terry, 63 N. Y. 613; People's Bank *v.* Bogart, 81 N. Y. 101; Hussey *v.* Sibley, 66 Me. 199; Lyons *v.* Miller, 6 Gratt. 440; Challis *v.* McCrum, 22 Kan. 157;

It has been held that there is no implied warranty of the genuineness of an instrument payable to bearer, when it is sold or exchanged.[1] This ruling is contrary to the general drift of authority, and it has been repudiated and overruled in Massachusetts,[2] and doubted in Maine.[3] The assignor also guarantees the genuineness of any preceding indorsements, where an instrument once payable to order has been made payable to bearer by a blank indorsement.[4]

This warranty of genuineness is only implied, and it may be excluded at any time by an express agreement that the transfer is made without it.[5]

Of the same character is the assignor's implied warranty that the instrument is legal and valid. It has lately been held in New York that the assignor is not liable to his assignee, if the paper turns out to be invalid because of the violation of some rule of law, — for example, the law against usury, — unless he, the assignor, knew of the illegality.[6] But the English and other State decisions hold that the illegality of the instrument constitutes a failure of consideration, and not a breach of warranty; and consequently

Hurst *v.* Chambers, 12 Bush, 155; Bankhead *v.* Owen, 60 Ala. 475; Snyder *v.* Reno, 36 Iowa, 329; Merriam *v.* Wolcott, 3 Allen, 258; Bartsch *v.* Attwater, 4 Conn. 419; Giffert *v.* West, 37 Wis. 116; Barton *v.* Trent, 3 Head, 167; Smith *v.* McNair, 19 Kan. 330; Jones *v.* Ryde, 1 Marsh. 157; 5 Taunt. 488. The guaranty extends to each and every signature, so that it is broken if one of the signatures is forged. Gurney *v.* Womersley, 4 E. & B. 133; *s. c.* 24 L. J. Q. B. 46. See also Merriam *v.* Wolcott, 3 Allen, 258; Allen *v.* Clark, 49 Vt. 390; Hurst *v.* Chambers, 12 Bush, 155.

[1] Baxter *v.* Duren, 29 Me. 434; Ellis *v.* Wild, 6 Mass. 321; Fisher *v.* Rieman, 12 Md. 511.

[2] Merriam *v.* Wolcott, 3 Allen, 258; Worthington *v.* Cowles, 112 Mass. 30.

[3] Hussey *v.* Sibley, 66 Me. 192.

[4] Giffert *v.* West, 37 Wis. 115.

[5] Bell *v.* Dagg, 60 N. Y. 530; Ross *v.* Terry, 63 N. Y. 615.

[6] Littauer *v.* Goldman, 72 N. Y. 506, overruling prior New York decisions.

knowledge of the defect is not at all essential to liability.[1]

The assignor also warrants that the parties to the instrument were competent to contract; and if any one of them is incompetent, on account of infancy, marriage, lunacy and the like, the assignor is responsible to his assignee.[2] But by a late decision of the United States Supreme Court, a different rule has been laid down for the assignors and assignees of government securities, viz.: in the sale of such securities the assignor does not impliedly guarantee the competency of the public officials to issue them.[3] The

[1] Hurd *v.* Hall, 12 Wis. 112; Gompertz *v.* Bartlett, 2 El. & B. 854; Young *v.* Cole, 3 Bing. N. C. 724; Challis *v.* McCrum, 22 Kan. 157; Giffert *v.* West, 33 Wis. 618; *s. c.* 37 Wis. 115; Lawton *v.* Howe, 14 Wis. 241; Costigan *v.* Hawkins, 22 Wis. 81; Morrison *v.* Lovell, 4 W. Va. 350 See also the following overruled New York decisions, Delaware Bank *v.* Jervis, 20 N. Y. 228; Webb *v.* Odell, 49 N. Y. 583; Bell *v.* Dagg, 60 N. Y. 530; Ross *v.* Terry, 63 N. Y. 614; Fuke *v.* Smith, 7 Abb. (N. S.) 106; Littauer *v.* Goldman, 16 N. Y. S. C. (9 Hun) 234, overruled in Littauer *v.* Goldman, 72 N. Y. 506.

[2] Lobdell *v.* Baker, 3 Metc. 472; 1 Met. 547; Thrall *v.* Newell, 19 Vt. 202; Baldwin *v.* Van Deusen, 37 N. Y. 487; Giffert *v.* West, 37 Wis. 115.

[3] Otis *v.* Cullom, 92 U. S. 448, Swayne, J., saying: "In Lambeth *v.* Heath, 15 M. & W. 486, the defendant bought for the plaintiff certain 'certificates of Kentish-Coast Railway scrip,' and received from him the money for them. Subsequently the directors repudiated the scrip upon the ground that it had been issued by the secretary without authority. The enterprise to which it related was abandoned. The action, which was for money had and received, was thereupon brought to recover back what had been paid for the scrip. The court put it to the jury to say whether the scrip bought was 'real Kentish railway scrip.' A verdict was found for the plaintiff upon this issue. A new trial was moved for, the defendant insisting the court had misdirected the jury. After hearing the argument, the court said: 'The question is simply this, — was what the parties bought in the market Kentish-Coast Railway scrip? It appears that it was signed by the secretary of the company, and if this was the only Kentish-Coast railway scrip in the market, as appears to have been the case, and one chooses to sell and another to buy, that then the latter has got all he contracted to buy. That was the question for the jury; but it was not left to them. The rule must there-

competency of public officials to issue instruments of indebtedness is a matter of record in most instances, and in every case the determination of that question is equally within the reach of all. Whereas, in the case of private bills and notes, it is very difficult for the purchaser to obtain this information for himself. This suggestion may furnish a stronger reason for the distinction thus made between public and private instruments of indebtedness.[1]

The assignor also warrants that he does not know anything affecting the validity or value of the instrument.[2] To attempt to sell an instrument which one knows to be

fore be absolute for a new trial.' The judges were unanimous. Here also the plaintiffs in error got exactly what they intended to buy and did buy. They took no guaranty. They are seeking to recover as it were upon one while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith; and *ex contractu*, there is an implied warranty on his part that they belong to him, and that they are not forgeries. When there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate his terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments must have passed, liable according to the principles, which the plaintiff in error insists shall be applied in this case. *Judgment affirmed.*"

[1] But it has been held in Nebraska, that if there are two sets of securities on the market, of the same general description, one of which is legal, and the other illegal, proof of that fact will enable the purchaser of the illegal security to recover back the purchase-money, on the ground that he had purchased something very different, viz.: the legal security of the same description. Rogers *v.* Walsh, 12 Neb. (1881) 28.

[2] Fenn *v.* Harrison, 3 T. R. 759; Popley *v.* Ashley, 6 Mod. 147; Holt, 121; Camidge *v.* Allenby, 6 Barn. & Cres. 373; Maupin *v.* Compton, 3 Bibb, 215; People's Bank *v.* Bogart, 81 N. Y. 106; Littauer *v.* Goldman, 72 N. Y. 506; Kennedy *v.* O'Connor, 35 Ga. 199; Howell *v.* Wilson, 2 Blackf. 418; Bridge *v.* Batchelder, 9 Allen, 394.

worthless is a fraud upon the purchaser, and naturally vitiates the contract of sale.

There is, however, no implied warranty that the instrument is not accommodation paper, for this class of paper is of very common occurrence, and is negotiated in the usual course of trade.[1]

Finally, the assignor guarantees that he has a good title to the instrument, and has a right to convey it away. The attempted transfer of property, to which one has no title, is held to be an actual or constructive fraud upon the purchaser, according to the knowledge or ignorance of the vendor, in respect to his want of title.[2] But, inasmuch as the *bona fide* holder can recover of the parties to the instrument, notwithstanding the defect of title of the assignor, and consequently the question here mooted can only arise as to holders who take the instruments with notice of the defect of title, it is difficult to see why these holders are entitled to any protection.[3]

§ 245. **Liability of broker in transfer of negotiable paper by delivery.** — If the broker discloses his agency and the name of the principal, he does not assume any personal liability in the transactions he conducts in his representative capacity, and hence he does not personally

[1] People's Bank *v.* Bogart, 81 N. Y. 107. In re Hammond, 6 De Gex, M. & G. 699, Lord Justice Knight Bruce: "Now I do not think that the mere circumstance of a man parting with a bill, without saying that this is an accommodation bill, amounts to an implied representation that it is not an accommodation bill."

[2] Baxter *v.* Duren, 29 Me. 434; Story on Notes, § 118; 1 Daniel's Negot. Inst., § 735.

[3] In 2 Parsons' N. & B. 187, it is stated: "Why should this be so (that is a warranty of title) when an honest transferee need give no such warranty? For, as we have seen, property follows possession; and the mere possession of the transferrer is enough to give a perfect title to the honest taker of the paper, negotiable by delivery only. We hold that the doctrine of implied warranty in sales is applicable to the sale of bills and notes only to the extent that one who sells indorsed notes warrants the indorsement genuine."

warrant the genuineness or value of the negotiable paper, which he transfers by delivery. But if in negotiating the sale of such paper, he suppresses his agency, or merely conceals the name of his principal, the purchaser is entitled to treat him as the principal, and hold him to the same liability in respect to implied warranties, as if he was the real principal.[1] But the broker may of course bind himself personally by an express warranty, notwithstanding he has fully disclosed his agency.[2] And, on the other hand, where he has not disclosed his agency, he may exempt his liability on implied warranties, by an express agreement to that effect.[3]

§ 246. **The transfer of negotiable paper payable to order — Indorsements.** — The proper and only complete way of transferring negotiable paper, payable to order, is by indorsement. Only by indorsement can the legal title be passed to the transferee.[4] The subject of *transfer by indorsement* will receive special treatment in a subsequent chapter.[5]

§ 247. **Assignment of negotiable paper payable to order.**— But while it requires an indorsement of such paper, in order to pass the legal title, the equitable title does pass with the delivery of the instrument without indorsement,

[1] Cabot Bank *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258; Worthington *v.* Cowles, 112 Mass. 30.

[2] Wilder *v.* Cowles, 100 Mass. 487.

[3] Bell *v.* Dagg, 60 N. Y. 530.

[4] Hopkirk *v.* Page, 2 Brock. 20; Blakely *v.* Grant, 6 Mass. 386; Russell *v.* Swan, 16 Mass. 314; Hestone *v.* Williamson, 2 Bibb, 83.

[5] See *post*, chap. XIII.

[6] Jones *v.* Witter, 13 Mass. 304; Richards *v.* Stevenson, 99 Mass. 312; Lackay *v.* Curtis, 6 Ired. Eq. 199; Miles *v.* Reiniger, 39 Ohio St. 499; Taylor *v.* Reese, 44 Miss. 89; First Nat. Bank *v.* Strang, 72 Ill. 559; Balmer *v.* Sunder, 11 Mo. App. 454; Fultz *v.* Walters, 2 Mont. 165; Dodge *v.* Nat. Exch. Bank, 30 Ohio St. 1; Wardop *v.* Dunlop, 1 Hun,

or by an assignment by deed;[1] or other formal instrument on a separate paper without delivery or indorsement of the paper.[2] But it has been held that an agreement "to be holder precisely the same as if I had indorsed the note," would, as between the immediate parties, be equivalent to an indorsement, and give the transferee all the rights of an indorsee.[3]

The transferee by assignment or by delivery of a bill or note payable to order is not treated as a *bona fide* holder. These modes of transfer of such paper do not happen in the ordinary course of business; and when either of them does occur, the transferee is necessarily put on his guard. He, therefore, takes the paper subject to all the equities that might be set up against his transferrer.[4] But it is

325; Van Riper *v.* Baldwin, 19 Hun, 344; Randall *v.* Lunt, 51 Me. 246; Hersey *v.* Elliot, 69 Me. 526; Golway *v.* Fullerton, 2 C. E. Green, 394; Hughes *v.* Nelson, 2 Stew. Eq. 547; Foreman *v.* Beckwith, 73 Ind. 55; Grover *v.* Grover, 24 Pick. 261; Hale *v.* Hale, 124 Mass. 292.

[1] Burdick *v.* Green, 15 Johns. 247; McClain *v.* Weidemeyer, 25 Mo. 364; McGee *v.* Riddlesbarger, 39 Mo. 365; Grand Gulf Bank *v.* Wood, 12 Sm. & M. 482; Ducarse *v.* Keyser, 28 La. Ann. 419.

[2] Freeman *v.* Perry, 22 Conn. 617; Osgood *v.* Artt, 17 Fed. Rep. 575; Davenport *v.* Woodbridge, 8 Me. 17; Goddrich *v.* Stanley, 23 Conn. 79; French *v.* Turner, 15 Ind. 62; Burrows *v.* Keays, 37 Mich. 431; Franklin *v.* Twogood, 18 Iowa, 517.

[3] Bishop *v.* Rowe, 71 Me. 263.

[4] Gibson *v.* Miller, 29 Mich. 355; Hull *v.* Swartout, 29 Mich. 249; Miller *v.* Tharel, 75 N. C. 148; Lossee *v.* Bissell, 76 Pa. St. 459; Sturges *v.* Miller, 80 Ill. 241; Peck *v.* Bligh, 37 Ill. 317; Allum *v.* Perry, 68 Me. 232; Simpson *v.* Hall, 47 Conn. 417; Jones *v.* Witter, 13 Mass. 305; Hedges *v.* Sealy, 9 Barb. 214; McMinn *v.* Freeman, 68 N. C. 341; Patterson *v.* Cave, 61 Mo. 439; Yonker *v.* Martin, 18 Iowa, 143; Hadden *v.* Rodkey, 17 Kan. 429; Terry *v.* Allis, 16 Wis. 478; Foreman *v.* Beckwith, 73 Ind. 515; Franklin *v.* Twogood, 18 Iowa, 515; Planters', etc., Ins. Co. *v.* Funstall, 72 Ala. 142; Matteson *v.* Morris, 40 Mich. 52; Osgood *v.* Artt, 17 Fed. Rep. 575; Boody *v.* Bartlett, 42 N. H. 558; Meggert *v.* Baum, 57 Miss. 22. This same rule applies to the transfer of an unindorsed check. Freund *v.* Importers, etc., Bank, 3 Hun, 689; *s. c.* 12 Hun, 537; *s. c.* affirmed in 76 N. Y. 352.

claimed that such a bill so transferred is not subject to fresh equities arising after notice to the drawer of the transfer.

Where a bill or note, payable to order, is transferred without indorsement, since the transferee acquires only the equitable title, he can only bring suit on the paper in the name of his assignor, at least in those States, where the common-law rules of pleading have not been changed by statute.[2] But in many of the States, it is now provided by statute that all actions shall be brought in the name of the real party in interest, so that the equitable assignee of notes and bills payable to order can and must bring suit in his own name.[3]

§ 248. Effect of a subsequent indorsement — Whether it relates back. — If a bill or note is transferred without

[1] 2 Parsons' N. & B. 46.

[2] Amherst Academy *v.* Cowls, 6 Pick. 427; Smalley *v.* Wight, 44 Me. 442; Tucker *v.* Tucker, 119 Mass. 79; Durgin *v.* Bartol, 64 Me. 473; Boyce *v.* Nye, 52 Vt. 372; Nichols *v.* Gross, 26 Ohio St. 425; Robinson *v.* Wilkinson, 38 Mich. 299; State *v.* Bank of Washington, 18 Ark. 554; Hardie *v.* Mills, 20 Ark. 153; Whistler *v.* Forster, 14 C. B. (N. S.) 248; Pease *v.* Hirst, 10 B. & C. 122. This has been held to be the case, even where a bill was drawn to the drawer's own order, and had been transferred without his indorsement. It was held that the action had to be brought in the drawer's name. Litcomb *v.* Thomas, 5 Me. 282.

[3] McGee *v.* Riddlesbarger, 39 Mo. 365; Boeka *v.* Muella, 28 Mo. 180; Lewis *v.* Bowen, 29 Mo. 202; Williard *v.* Moies, 30 Mo. 142; Willey *v.* Gatling, 70 N. C. 410; Andrews *v.* McDaniel, 68 N. C. 385; Wilcoxen *v.* Logan, 91 N. C. 449; Thornton *v.* Crowther, 24 Mo. 164; Nelson *v.* Eaton, 26 N. Y. 410; Morris *v.* Poillon, 50 Ala. 403; Taylor *v.* Reese, 44 Miss. 89; Weeks *v.* Medler, 20 Kan. 57. The plaintiff in suit on a note or bill, need not aver an indorsement in any case. Billings *v.* Jane, 11 Barb. 620. In some of the States the assignor is required to be made a party, defendant or plaintiff. Keller *v.* Williams, 49 Ind. 504; Perry *v.* Seitz, 2 Duv. 122. But if a note is assigned without indorsement in a State, where such assignees are permitted to sue in their own names, the assignee cannot claim this right in the courts of a State, which compels such assignees to bring their actions in the names of their assignors. The *lex fori* determines the form of the action. Foss *v.* Nutting, 14 Gray 484.

indorsement, but the transfer is made with a promise to indorse; or the indorsement has been omitted on account of some accident, mistake or fraud; the subsequent indorsement will relate back to the time of the transfer, and will shut out all equities as effectually as if it had been made at the same time.[1] And the holder may, under such circumstances, by an appropriate action, compel an execution of the indorsement.[2] But if the transfer is made without any promise of a future indorsement, the subsequent indorsement does not relate back, so that the transferee will take the instrument subject to any equity that might come to his knowledge before the indorsement.[3] A different rule is applied to the effect of a subsequent indorsement on the right of set-off. It is held that in any case the subsequent indorsement relates back to shut out all set-offs, that might otherwise be set up in an action by the transferee. The right of set-off is not an equity.[4]

§ 249. **Equitable or implied assignment of negotiable paper.**—The assignment of negotiable paper may occur in equity, merely by operation of law, — an assignment that is implied by law by a court of equity, in order to carry

[1] Southard *v.* Porter, 43 N. H. 380; Haskell *v.* Mitchell, 53 Me. 468; Watkins *v.* Maule, 2 Jacob & W. 237; Weeks *v.* Medler, 20 Kan. 57. But in order that such a subsequent indorsement may shut out the equitable defenses, the indorsement must be made before maturity. Haskell *v.* Mitchell, 53 Me. 468.

[2] Watkins *v.* Maule, 2 Jacob & Walk. 237; Ex parte Greening, 13 Ves. 206. And where the transferrer has in the meanwhile become bankrupt, his assignee in bankruptcy may be directed to make the indorsement. Ex parte Rhodes, 3 Mont. & Ayr. 217; Ex parte Greening, 13 Ves. 206.

[3] Lancaster Nat. Bank *v.* Taylor, 100 Mass. 24; Southard *v.* Porter, 43 N. H. 380; Clark *v.* Whitaker, 50 N. H. 474; Whistler *v.* Forster, 14 J. Scott. (N. S.) (108 E. C. L. R.) 254. In Wisconsin, it is held that the indorsement will relate back so as to exclude any equity arising outside of the note itself. Beard *v.* Dedolph, 29 Wis. 136.

[4] Ranger *v.* Carey, 1 Met. 369; Beard *v.* Dedolph, 29 Wis. 136. But see, *contra*, Odiorne *v.* Woodman, 39 N. H. 544.

out the real intent of the parties, or to do justice between them. Thus, if a debt is assigned, it will carry, by implication, all the papers which the creditor holds as security for the debt. This implied transfer of the securities is an equitable assignment, which can be effectually enforced in equity.[1] A renewal of a note or bill will also carry by equitable assignment all the papers held as collateral security of the original paper.[2]

§ 250. **Title to commercial paper passes by sale without delivery.** — It is a general rule, according to the common law, that unless it can be shown that such was not the intention of the parties, a contract for the sale of specific goods vests the title thereto in the buyer, immediately and before delivery of the goods.[3] This principle has been applied to commercial paper, and the opinion has been held that the purchaser of a note acquires on the executory contract of sale such a title to the note, as to enable him to recover it of a subsequent holder, who took it with notice of the prior contract of sale.[4] But it is still the general

[1] Adams *v.* Jones, 12 Ad. & E. 455; Marston *v.* Allen, 8 M. & W. 494; Hayes *v.* Caulfield, 5 Q. B. 81; Freeman's Bank *v.* Ruckman, 16 Gratt. 129; Mechanics' Bldg. Assn., 29 La. 549; Dodge *v.* Bank, 1 McArthur, 420; Debruh *v.* Maas, 54 Tex. 464; Fisher *v.* Otis, 3 Chandl. 83; Garret *v.* Williams, 31 Ark. 240; Martin *v.* O'Bannon, 35 Ark. 68; Murray *v.* Jones, 50 Ga. 118; Titcomb *v.* Thomas, 5 Greenl. 282; Citizen's Bank *v.* Ferry, 32 La. Ann. 120; Hall *v.* Mobile, etc., R. R. Co., 58 Ala. 10; Kerhane *v.* Smith, 97 Ill. 159; Walker *v.* Kee, 14 S. C. 144; Jones *v.* Witter, 13 Mass. 282; Dunn *v.* Snell, 15 Mass. 485; Miller *v.* Ord, 2 Binn. 382; Fox *v.* Foster, 4 Pa. St. 119; Waller *v.* Tate, 4 B. Mon. 529; Croft *v.* Bunster, 9 Wis. 503; Kelley *v.* Whitney, 45 Wis. 110; Potter *v.* Stranskey, 48 Wis. 244; Johnson *v.* Carpenter, 7 Minn. 183; Holmes *v.* McGintry, 44 Miss. 94.

[2] Gleason *v.* Wright, 55 Miss. 247.

[3] Benjamin on Sales (20 ed.) 226.

[4] Sheldon *v.* Parker, 10 N. Y. S. C. (3 Hun) 499; Allison *v.* Barrett, 16 Iowa, 278. But see Allison *v.* King, 21 Iowa, 302, where it was held that the buyer's title on a contract of sale and without delivery is so inchoate

rule, that the delivery of an instrument is essential to complete legal transfer.

§ 251. **Transfer by legal process — Attachment, garnishment, execution.** — The three principal legal processes, whereby property may be transferred to a creditor in satisfaction of his claim, are attachment, garnishment and execution. They are all the creatures of statute, and whether commercial paper can be transferred by them for the satisfaction of the holder's debts depends upon the language of the particular statute under which the question arises.[2] The attachment of bills and notes, and other evidences of indebtedness, is expressly authorized in Connecticut, Missouri, Minnesota, Nebraska, New York, Tennessee, and Vermont.[3] And the right to attach such instrument of indebtedness may be inferred from the authority to attach "debts," "debts, credits and effects," and from like general expressions, contained in the statute on the subject of attachment, in Alabama, Arkansas, California, Colorado, Delaware, Florida, Illinois, Iowa, Kansas, Maryland, Michigan, Mississippi, Nevada, New Jersey, North Carolina,

that if delivery was refused and the commercial paper was afterwards levied on and sold as the property of the seller, after maturity and with notice to the first purchaser, the purchaser under the execution will acquire an absolute title to the paper.

[1] Rex *v.* Lambton, 5 Price, 428; Marston *v.* Allen, 8 M. & W. 494; Dogan *v.* Dubois, 2 Rich. Eq. 85; Clerk *v.* Boyd, 2 Ohio, 56; Mendenhall *v.* Baylies, 47 Ind. 575; Wulschner *v.* Sells, 87 Ind. 71; Benton *v.* Peters, L. R. 5 Q. B. 475; Kittle *v.* Delameter, 3 Neb. 325; *s. c.* 4 Neb. 426; Goodwin *v.* Davenport, 47 Me. 112; May *v.* Cassiday, 7 Ark. 376; Cox *v.* Troy, 5 B. & Ald. 474; *s. c.* 1 D. & Ry. 38; Chapman *v.* Cottrell, 34 L. J. Exch. 186.

[2] See, *post*, chapter on Law of Place, as to what law governs the question.

[3] Conn. G. S. (1875) 409, § 40; Mo. Rev. Stat. (1879), § 416; Minn. G. S. (1878) 729, § 150; Neb. C. S. (1885), §§ 212, 214; N. Y. Code Civ. Proc. (1882), § 648; Tenn. Code (1884), § 4236; Vermont R. L. (1880), § 1069.

Ohio, Pennsylvania, South Carolina, Virginia, West Virginia.[1] Attachment of commercial paper is also held to be permissible under a general authority to attach all kinds of property, in Oregon, Texas, New Hampshire and Wisconsin[2] and perhaps in other States.[3] In Rhode Island, commercial paper is expressly exempt from attachment,[4] while in Maine and Massachusetts, only bank-notes, and other evidences of indebtedness of moneyed corporations, which pass current as money, can be attached. Commercial paper in general cannot be attached.[5] In Louisiana, bills and notes may be attached as the property of the payee, even when they are in the hands of a depositary, but it is required in such a case, that the sheriff must take them into his possession.[6]

As a general rule, commercial paper in the hands of a depositary for the payee, and not yet due, cannot be

[1] *Ala.* Code (1876), § 3268; Ark. Dig. Stat. (1884), § 320; California, Code Civ. Proc. (1885), § 542; Col. G. S. (1883), § 2007; Del. R. S. (1852) amd. 1874; Fla. McCleb. Dig. (1881) 550, § 13; Ill. Ann. Stat, (1885), 313, ch. 13, § 8. But it has been held in Illinois that the statute does not authorize the attachment of promissory notes. Prout *v.* Grout, 72 Ill., 456 Iowa R. C (1880), § 2967; Kans. C. L. (1885), §§ 4002, 4015; Md. R. C. (1878), 673, § 8; Mich. C. L. (1871), §§ 6460, 6471, 6488; Miss. R. C. (1880), § 2423; Nev. C. L. (1873), § 1189; N. J. Rev. Stat. (1874), p. 42; N. C. Code Civ. Proc. (1883), §§ 349, 363; Ohio R. S. (1880), § 5524; Penn. Pard. Dig. (1885) 743, § 37; So. Ca. Code Civ. Proc. (1882), § 253; Va. Code (1873), 1011, § 9; W. Va. Amd. Code (1884), 648, § 5.

[2] Oreg. G. L. (1872) 137, § 146, 164; Tex. R. S. (1879), art. 167; Wis. R. S. (1878), § 2738.

[3] See Ga. Code (1882), § 3287; Ind. R. S. (1881) § 913. In New Hampshire, since 1867, only negotiable paper, which is made and payable in that State, can be attached. G. L. (1873) 517, ch. 224, § 1. See Chadbourn *v.* Gilman, —N. H. (1885)

[4] R. I. Pub. Stat. (1882), ch. 209, § 4.

[5] Me. Rev. Stat. 676, § 24; Mass. Pub. Stat. (1882), 925, ch. 161, § 38. See also Indiana, R. S. (1881), § 913; Illinois, Annot Stat. 313, ch. 11, § 8 (1885).

[6] Lassiter *v.* Bussy, 14 La. Ann. 699; Mille *v.* Hebert, 19 La. Ann. 58; Pleasants *v.* Kemp, 28 La. Ann. 124; Reynolds *v.* Horn, 4 La. Ann. 187

attached.[1] Nor is commercial paper attachable for the debts of the payee, when it is in the hands of a receiver or assignee for the benefit of creditors;[2] nor when it is placed in the hands of an agent to collect and apply the proceeds to the payment of a specific debt;[3] and even when it is merely placed in the hands of an agent for collection or for any other purpose, resulting in benefit to the payee.[4] It is not even subject to attachment, if the agent delivers it up to the attaching officer.[5] If an agent invests money of his principal in a note payable to himself, the note will not be subject to attachment in Vermont as the property of the principal.[6]

It is very generally held that promissory notes and other commercial instruments cannot be garnished in the hands of an agent, in an attachment proceeding against the payee.[7] It is also the general rule, that the maker

[1] Moore *v.* Pillow, 3 Humph. 448; Wilson *v.* Albright, 2 Greene (Iowa), 125.

[2] Taylor *v.* Gillean, 23 Tex. 508; Gore *v.* Clisby, 8 Pick. 555.

[3] Dickinson *v.* Strong, 4 Pick. 57; Clark *v.* Cilley, 36 Ala. 652; Smith *v.* Clark, 9 Iowa, 241.

[4] New Hampshire, etc., Co. *v.* Platt, 5 N. H. 193; Fitch *v.* Waite, 5 Conn. 117; Tirrell *v.* Canada, 25 Tex. 455; Ellison *v.* Tuttle, 26 Tex. 283.

[5] Rhoads *v.* Megonigal, 2 Pa. St. 39. But the agent is not liable in trover, if he retains a note on account of an attachment against his principal. Fletcher *v.* Fletcher, 7 N. H. 452.

[6] Fuller *v.* Jewett, 37 Vt. 473.

[7] Maine F. & M. Ins. Co. *v.* Weeks, 7 Mass. 438; Perry *v.* Coates, 9 Mass. 537; Dickinson *v.* Strong, 4 Pick. 57; Andrews *v.* Ludlow, 5 Pick. 28; Lupton *v.* Cutter, 8 Pick. 298; Gore *v.* Clisby, 8 Pick 555; N. H. I. F. Co. *v.* Platt, 5 N. H. 193; Stone *v.* Dean, 5 N. H. 502; Fletcher *v.* Fletcher, 7 N. H. 452; Howland *v.* Spencer, 14 N. H. 530; Hitchcock *v.* Egerton, 8 Vt. 202; Van Amee *v.* Jackson, 35 Vt. 173; Ruondlet *v.* Jordon, 3 Me. 47; Copeland *v.* Weld, 8 Me. 411; Clark *v.* Viles, 32 Me. 32; Wilson *v.* Wood, 34 Me. 123; Skowhegan Bank *v.* Farrar, 46 Me. 293; Deacon *v.* Oliver, 14 How. 610; Fitch *v.* Wait, 5 Conn. 117; Grosvenor *v.* F. & M. Bank, 13 Conn. 104; Raignel *v.* McConnell, 25 Pa. St. 362; Jones *v.* Norris, 2 Ala. 526; Marston *v.* Carr, 16 Ala. 325; Moore *v.* Pillow, 3 Humph. 448; Price *v.* Brady, 21 Tex. 614; Taylor *v.* Gillian, 23 Tex. 508; Wilson *v.* Albright, 2 G. Greene, 125.

or acceptor of commercial paper cannot be garnished under an attachment against the payee or indorsee, at least as long as the paper is still negotiable, *i.e.*, before maturity; the reason being that its negotiability would bring the claims of the attaching creditor into conflict with a *bona fide* holder, and subject the maker possibly to the requirement of being liable to two antagonistic parties on the same indebtedness; or at the least, to subject him to the necessity of participating in another's lawsuit, a result not at all contemplated in the issue of negotiable instruments.[1]

[1] Dusendorf *v.* Oliver, 8 Kan. 365; Gaffney *v.* Bradford, 2 Bailey, 441; Greer *v.* Powell, 1 Bush, 489; Howe *v.* Hartness, 11 Ohio St. 449; Littlefield *v.* Hodge, 6 Mich. 326; Bowker *v.* Hill, 60 Me. 172; Hubbard *v.* Williams, 1 Minn. 54; Gregory *v.* Higgins, 10 Cal. 339; Denham *v.* Pogue, 20 La. Ann. 195; Meyers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564; Wybrants *v.* Rice, 3 Tex. 458; Iglehart *v.* Moore, 21 Tex. 501; Bassett *v.* Garthwaite, 22 Tex. 230; Davis *v.* Pawlette, 3 Wis. 300; Carson *v.* Allen, 2 Chandl. 123; Smith *v.* Blatchford, 2 Ind. 184. In Sheets *v.* Culver, 14 La. 449, the court said: "In this case, negotiable paper, supposed to belong to the defendant, is attempted to be attached, by interrogatories propounded to the maker, and upon the latter answering that he does not know by whom his notes are held, he is sought to be made liable as if he had actually declared himself indebted to defendant. Untenable as such a position would seem to be, an effort has been made to support it by argument. It is said the attachment was laid in the garnishee's hands before he had notice of the transfer of his notes, and a series of decisions of this court have been cited to show that the transferee of a debt is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having been made; than this, there is, perhaps, no principle of our laws better settled; but it obviously applies only to credits not in a negotiable form. As to notes indorsed in blank, which circulate and pass from hand to hand by mere delivery, it has never been, nor can it be pretended, that any notice of transfer is necessary. If, then, no such notice is ever given, how is a garnishee, who has issued his promissory note, indorsed in blank, to know in whose hands it happens to be at the precise moment when he is called upon to answer interrogatories? And if, perchance, he were to know that his note was still the property of the defendant, and were so to declare it, could such a proceeding restrain its negotiability? Could it affect the rights of a *bona fide* holder? Surely not. The ownership of negotiable paper is incessantly vary-

But, on the other hand, in many of the States, it is held that the obligors of commercial paper may be garnished, and the attachment thus obtained will prevail as long as there is no transfer before maturity. In other words, the garnishment is operative to attach the claim or credit of the defendant, represented by a negotiable instrument, but the attachment will be defeated by a transfer to a *bona fide* holder.[1] In Vermont it is required by statute that the purchaser of a negotiable instrument, other than a bank, or insurance company, in order to take the instrument free from the claims of a subsequent attachment, must give notice to the maker or acceptor of its transfer to him. He takes the instrument subject to all

ing, and the obligation of the maker of such instruments is not to pay to any particular person, but to the holder at maturity, whoever he might be. Thus it is obvious, that the garnishee, in this case, could give no other answer than that he has made, and it is equally obvious, that by pursuing this course, the plaintiffs have attached no property out of which their judgment can be satisfied."

[1] Enos *v.* Tuttle, 3 Conn. 27; Culver *v.* Parrish, 21 Conn. 408; Scott *v.* Hill, 3 Mo. 88; Walden *v.* Valliant, 15 Mo. 409; Funkhouser *v.* How, 24 Mo. 44; Dickey *v.* Fox, 24 Mo. 217; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564; Kieffer *v.* Ehler, 18 Pa. St. 388, the court saying: "To hold that an attachment prevents a subsequent *bona fide* indorsee for value from acquiring a good title, would be almost a destruction of one of the essential characteristics of negotiable paper. It would be a great injury to persons in embarrassed circumstances holding such paper; for no one could buy it from them with any confidence in the title. Moreover, it would present the strange result, that the more hands such paper had passed through, and the more indorsers there were on it, the less it would be worth in the money market; for it would be subject to the more risks of attachment." Hill *v.* Kroft, 29 Pa. St. 186; Mayberry *v.* Morris, 62 Ala. 113; Green *v.* Gillet, 5 Day, 485; Mims *v.* West, 38 Ga. 18; Warne *v.* Kendall, 78 Ill. 598; Cruett *v.* Jenkins, 53 Ind. 217, overruling Somerville *v.* Brown, 5 Gill, 399, where it was held that the attachment prevailed against *bona fide* holders; Potter *v.* McDowell, 43 Mo. 93; Mason *v.* Noonan, 7 Wis. 609; Matheny *v.* Hughes, 10 Heisk. 401; Fulweiler *v.* Hughes, 17 Pa. St. 440; Day *v.* Zimmerman, 68 Pa. St. 72.

attachments, intervening before such a notice.[1] But as soon as the instrument becomes due, its negotiability is at an end, and if it be subsequently assigned, the assignee takes it subject to all the defenses that can be set up against it in the hands of the holder at maturity. A prior attachment would therefore prevail against such a transfer after maturity.[2] But in every such case, the attachment must precede the transfer; and in some of the cases it is held that the attachment by garnishment will not operate, unless it be shown that the defendant is at the time the holder of the instruments garnished.[3]

If the garnishee should in his answer make the mistake of admitting his indebtedness to the defendants, judgment will be entered up against him in favor of the attaching creditor, although it is discovered afterwards that the negotiable instrument, which represents the indebtedness,

[1] Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, 16 Vt. 594; Worden *v.* Nourse, 36 Vt. 756. But the notice is sufficient, if given to one of several joint and several makers (Ayott *v.* Smith, 40 Vt. 532,), or to an accommodation indorser (Hunt *v.* Miles, 42 Vt. 533). It is not necessary to give notice to a surety, Seward *v.* Garlin, 33 Vt. 583. Notice must be given, by the indorsee or his agent; notice by a stranger is not sufficient. Peck *v.* Walton, 25 Vt. 33; Worden *v.* Nourse, 36 Vt. 756. Knowledge of the transfer by the maker or other primary obligor takes the place of notice. Seward *v.* Garlin, 33 Vt. 583; Farmers, etc., Bank *v.* Drury, 35 Vt. 469. But see Peck *v.* Walton, 25 Vt. 33. See Shetler *v.* Thomas, 16 Ind. 223; Elston *v.* Gillis, 69 Ind. 128; Smith *v.* Blatchford, 2 Ind. 184; Cadwallader *v.* Hartley, 17 Ind. 520; Bill *v.* Hauney, 15 La. Ann. 654; Amoskeag Mfg. Co. *v.* Gibbs, 28 N. H. 316.

[2] Mills *v.* Stewart, 12 Ala. 90; Leslie *v.* Merrill, 58 Ala. 322; Culver *v.* Parish, 21 Conn. 408; Hill *v.* Kroft, 29 Pa. St. 186; Burton *v.* Wynne, 55 Ga. 615; Cleneay *v.* Junction R. R. Co., 26 Ind. 375; Junction R. R. Co. *v.* Cleneay, 13 Ind. 161; Huff *v.* Mills, 7 Yerg. 42; Bassett *v.* Garthwaite, 22 Tex. 230. But see, *contra*, Miller *v.* Streeder, 18 La. Ann. 56, where it is held that an actual seizure of the instrument is necessary to support an attachment. See also, *contra*, Knisely *v.* Evans, 34 Ohio St. 158.

[3] Cleneay *v.* Junction R. R. Co., 26 Ind. 375; Junction R. R. Co. *v.* Cleneay, 13 Ind. 161; Bassett *v.* Garthwaite, 22 Tex. 230; Price *v.* Brady, 21 Tex. 614.

has been transferred to a *bona fide* holder. He will be liable to the attaching creditor as well as to the *bona fide* holder of the instrument.[1] But if he pleads that the instrument has been transferred by the payee, or that he does not know whether the payee, or defendant, is still the holder of the instrument, the burden is then thrown upon the garnisher of showing that the instrument has not been transferred.[2]

The writ of execution is also a creature of statute. At common law, no *chose in action* could be reached by legal process for the benefit of creditors. But in England [3] and in many of the States of the American Union, an execution, issued in satisfaction of a judgment debt, is made by statute to cover the negotiable instruments, payable to the judgment debtor. Execution may be levied on all kinds of *choses in action*, including negotiable instruments, in California, Iowa, Kansas, Minnesota, Nevada, Oregon, Pennsylvania, Texas, and West Virginia.[4] Execution may be levied on negotiable instruments only in Missouri, New York, Wisconsin.[5] In Arkansas, Colorado, Illinois, Indi-

[1] Crayton *v.* Clark, 11 Ala. 787; Bibb *v.* Tomberlin, 1 Duv. 186; Cross *v.* Halderman, 15 Ark. 200; Daniels *v.* Rawlings, 6 Humph. 403; Yarborough *v.* Thompson, 3 Sm. & M. 291.

[2] Ormond *v.* Moye, 11 Ired. 564; Thompson *v.* Shelby, 3 Sm. & M. 296; Davis *v.* Pawlette, 3 Wis. 300; Foster *v.* Walker, Ala. 177; Wicks *v.* Branch Bank, 12 Ala. 594; Turner *v.* Armstrong, 9 Yerg. 412; Daniel *v.* Rawlings, 6 Humph. 403; McNeill *v.* Roach, 49 Miss. 436.

[3] 1 & 2 Vict., c. 110, § 12.

[4] Cal. Dearing's Code (1885), C. P., § 688; Iowa R. C. (1880), § 3046; Savery *v.* Hays, 20 Iowa, 25; Hetherington *v.* Hayden, 11 Iowa, 335; Earhart *v.* Gant, 32 Iowa, 481; Allison *v.* Barrett, 16 Iowa, 278; Kan. Dassler's C. L. (1885), § 4294; Minn. G. S. (1878), p. 755, § 300; Nev. C. L. (1873), § 1280; Oregon G. L. (1872), 164; Pa. Pard. Dig. (1885), 741, §§ 15, 17; Texas R. S. (1879), art. 167; W. Va. Amd. Code (1884), 648, § 5. See Ky. G. S. (1881), 417, ch. 38, § 2; Fla. McClell. Dig. Laws (1881) 522, § 6.

[5] In Missouri, on notes, bill, bonds and certificates of deposit, Mo. Rev. Stat. (1879), § 2358; N. Y. Code Civ. Proc., § 1411; Ingalls *v.* Lord,

ana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, Vermont, and Viriginia, only those negotiable instruments may be levied upon, which circulate as money like bank-notes. Other negotiable instruments cannot be reached by execution.[1] All *choses in action*, including negotiable instruments, are beyond the reach of an execution in Alabama, Florida, Georgia, Michigan, Ohio.[2]

It may be added that the *choses in action* of the debtor may be reached by the creditor by equitable or supplementary proceedings in Delaware, Nebraska, South Carolina, and Tennessee.[3]

§ 252. **Transfer donatio mortis causa.** — A gift made in contemplation of the death of the donor is called in the civil law, from which all the principles of the law are taken, *donatio mortis causa*. In order that it may take effect in passing the absolute title to the thing donated, the following requisites must concur: (1) it must be made in immediate apprehension of death;[4] (2) that the donor

1 Cow. 249; Ransom *v.* Miner, 3 Sandf. 692; Wis. R. S. (1878), § 2987. A levy on promissory note can only be made by getting possession of note. Anthony *v.* Wood, 96 N. Y. 181.

[1] Col. G. S. (1883), § 1876; Ill. Ann. Stat. Starr & Curtis (1885), 1408, ch. 77, § 42; Ark. Dig. Stat. (1884), § 3001; Field *v.* Lawson, 5 Ark. 376; Ind. R. S. (1881), § 721; Johnson *v.* Crawford, 6 Blackf. 377; McClellan *v.* Hubbard, 2 Blackf. 361; McKnight *v.* Kinsely, 25 Ind. 336; Me. R. S. (1883) 721; §§ 1, 2; Bowker *v.* Hill, 60 Me. 172; Smith *v.* Kennebec, etc., R. R. Co., 45 Me. 547; Mass. Pub. Stat. (1882) 1004, ch. 171, § 33; Perry *v.* Coates, 9 Mass. 537; Miss. R. C. (1880), § 1765; N. H. G. L. (1878) 545, ch. 236, § 1; N. J. Rev. (1874), 389, § 4; Vt. R. L. (1880) § 1555; Va. Code (1873) 1175, § 27.

[2] Ala. Code (1876), § 3209; Jones *v.* Morris, 2 Ala. 526; Fla. McClell. Dig. Laws (1881) 522, § 6; Ga. Code (1882), § 3632; McGehee *v.* Cherry, 6 Ga. 550; People *v.* Auditors, 5 Mich. 223; 2 R. S. Ohio (1880), § 5374.

[3] Robinson *v.* Mitchell, 1 Harr. 365; Neb. C. S. 688, §§ 476, 532; So. Ca. Code (1882), § 317; Tenn. Code (1884), § 3810.

[4] A gift in expectation of the future possibility of death, — as where a soldier, on going out to a war, or a sailor, on the eve of a long voyage,

should die of the same ailment which caused the apprehension of death;[1] (3) there must be a delivery, actual or symbolical, and, (4) it must be accepted by the donee.

The gift may be delivered to the donee, or to some third person for him.[2] The third person, to whom it is delivered, must in turn deliver it to the intended donee, at or before the donor's death.[3] Or it may be returned to the donor to keep or to collect for the donee.[4] The delivery need not be actual and manual. It may be constructive, and implied from acts which indicate clearly the intention to transfer title.[5]

makes a gift to take effect if he does not return, — is not a good *donatio mortis causa*. Gourley *v.* Linsenbigler, 51 Pa. St. 345; Brickhouse *v.* Brickhouse, 11 Ired. 404; Irish *v.* Nutting, 47 Barb. 370. And it must appear by satisfactory evidence that the gift was made in apprehension of death. Edwards *v.* Jones, 1 My. & Cr. 226. But the length of time before the death is not essential, provided at the time the gift was made there was an immediate apprehension of death. Gardner *v.* Gardner, 22, Wend. 526; Darland *v.* Taylor, 52 Iowa 503.

[1] The recovery of the donor defeats the gift. Staniland *v.* Willott, 3 MacN. & G. 664. And the donor may revoke the gift at any time before his death. Parker *v.* Marston, 27 Me 196.

[2] Ward *v.* Turner, 2 Ves. sr. 431; McKenzie *v.* Downing, 25 Ga. 669; Jones *v.* Dever, 16 Ala. 221. There may be a delivery to one person for the benefit of two or more donees. Borneman *v.* Sidlinger, 15 Me. 429; Brunson *v.* Brunson, Meigs, 635. In any case the intention to deliver must be made clear. Dunne *v.* Boyd, I. R. 8 Eq. 609.

[3] Sessions *v.* Moseley, 4 Cush. 87. And if the holder refuses to so deliver it to the donee, the latter may recover it of him by an appropriate action. Contant *v.* Schuyler, 1 Paige, 316; Wells *v.* Tucker, 3 Binn. 366.

[4] Grover *v.* Grover, 24 Pick. 261.

[5] A direction to a trustee to give a note, belonging to the donor, to the donee, is a good constructive delivery. Southerland *v.* Southerland, 4 Buch. 591; an attorney's receipt for a bond in his possession at the direction of the donor, Elam *v.* Keen, 4 Leigh. 333; a wife's direction to her husband to take the money, referring to a note in a bureau drawer, Stevens *v.* Stevens, 2 Hun, 470; the surrender or destruction of the donee's bill or note, Garland *v.* Garland, 22 Wend. 526; Lee *v.* Boak, 11 Gratt. 182; Hurst *v.* Beach, 5 Madd. 351; Darland *v.* Taylor, 52 Iowa, 503. But see Blanchard *v.* Sheldon, 43 Vt. 512.

At first it was held that only things, which were susceptible of manual delivery, could pass by a *donatio mortis causa;* but the rule began immediately to be relaxed and extended in its application, so as to admit of the gift in this way of negotiable bills and notes, either payable to bearer, or indorsed by the donor in blank.[1] It was once doubted whether there could be a good *donatio mortis causa* of an unindorsed negotiable paper, payable to order.[2] But it is now very generally held that for the purpose of a *donatio mortis causa*, the indorsement was a mere technicality, and that there may be a good gift of the negotiable instrument without indorsement by the donor.[3] The donee in such a case gets only the equitable title,[4] and must bring suit in the name of the donor's personal representatives, unless the common-law rule in regard to assignment of choses in actions has been repealed, when the donee can sue in his own name;[5] or he may

[1] Rankin *v.* Wegnelin, 27 Beav. 309; Veal *v.* Veal, 27 Beav. 303; Drury *v.* Smith, 1 P. Wms. 405; Lawson *v.* Lawson, 1 P. Wms. 411; Miller *v.* Miller, 3 P. Wms. 356; Weston *v.* Hight, 17 Me. 287; House *v.* Grant, 4 Lans. 296; Burke *v.* Bishop, 27 La. Ann. 465 (27 Am. Rep. 567); Turpin *v.* Thompson, 2 Met. (Ky.) 420. Where the donor has indorsed the paper, the indorsement only operates as a transfer of the donor's legal title, and does not make his estate liable as an indorser. Weston *v.* Hight, 17 Me. 287. See also Veal *v.* Veal, 27 Beav. 303; Rankin *v.* Wegnelin, 27 Beav. 309.

[2] Miller *v.* Miller, 3 P. Wms. 356; 1 Daniel's Negot. Inst., § 24; Chitty on Bills, 3.

[3] Veal *v.* Veal, 27 Beav. 303; Rankin *v.* Wegnelin, 27 Beav. 309; Borneman *v.* Sedlinger, 15 Me. 429; Parker *v* Marston, 27 Me. 196; Bates *v.* Kempton, 7 Gray, 382; Grover *v.* Grover, 24 Pick. 261; Chase *v.* Redding, 13 Gray, 418; Keniston *v.* Scena, 54 N. H. 24; Brown *v.* Brown, 18 Conn. 409; McConnell *v.* McConnell, 11 Vt. 290; Tillinghast *v.* Wheaton, 8 R. I. 536; Stevens *v.* Stevens, 9 N. Y. S. C. (2 Hun) 472; Contant *v.* Schuyler, 1 Paige, 315; Turpin *v.* Thompson, 2 Met. (Ky.) 420; Jones *v.* Deyer, 16 Ala. 221.

[4] Ashbrook *v.* Pyon, 2 Bush, 228.

[5] See *ante*, § 241.

compel the donor's representatives to indorse the paper for him.[1]

But a donor cannot make a *donatio mortis causa* of his own bill of exchange, or promissory note, for the reason that it constitutes a contract without a consideration, which cannot be enforced in the courts.[2]

As a general rule the gift of the donor's check, which is not presented until after the death of the donor, is held to be an invalid *donatio mortis causa*.[3] But if such a check is paid by the bank, before receiving notice of the drawer's death,[4] or it passes into the hands of a *bona fide* holder before the donor's death,[5] it passes a good title, and may be enforced against the donor's estate.

[1] Veal *v.* Veal, 27 Beav. 303; Rankin *v.* Wegnelin, 27 Beav. 309; Duffield *v.* Elwes, 1 Bligh N. R. 409.

[2] Fink *v.* Cox, 18 Johns. 145; Harris *v.* Clark, 3 N. Y. 93, overruling Wright *v.* Wright, 1 Cow. 598; Copp *v.* Sawyer, 6 N. H. 386; Phelps *v.* Pond, 23 N. Y. 69; Hamor *v.* Moore, 8 Ohio St. 239; Blanchard *v.* Williamson, 70 Ill. 647; De Pouilly's Succession, 22 La. Ann. 97; Parish *v.* Stone, 74 Pick. 198; Warren *v.* Durfee, 126 Mass. 338; Flint *v.* Paltee, 33 N. H. 520; Holly *v.* Adams, 16 Vt. 206; Smith *v.* Kittredge, 21 Vt. 238; Raymond *v.* Sellick, 10 Conn. 480; Voorhees *v.* Woodhull, 4 Vroom. 494; Helfenstein's Estate, 77 Pa. St. 328; Hall *v.* Howard, Rice, 310; Smith *v.* Smith, 3 Stew. Eq. 564. But where there is a valuable consideration for the note, the transfer will be upheld by the courts. Dean *v.* Carruth, 108 Mass. 242; Bowers *v.* Hurd, 10 Mass. 427.

[3] Curry *v.* Powers, 70 N. Y. 212; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457; Second Nat. Bank *v.* Williams, 13 Mich. 282; Bouts *v.* Ellis, 17 Beav. 121; 4 DeG. M. & G. 249; Beak *v.* Beak, L. R. 13 Eq. 489; DePouilly's Succession, 22 La. Ann. 97.

[4] Tate *v.* Hilbert, 2 Ves. jr. 111; *s. c.* 4 Bro. C. C. 280.

[5] Rolls *v.* Pearce, L. R. 5 Ch. D. 730. See Lawson *v.* Lawson, 1 P. Wms. 441.

CHAPTER XIII.

TRANSFER BY INDORSEMENT.

SECTION 256. The meaning of indorsement — Includes delivery.
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§ 256. **The meaning of indorsement — Includes delivery.** — The term *indorsement* means literally, writing *on the back*, being derived from the words *in dorsa*. In this sense any kind of instrument of indebtedness may be indorsed.[1] But the word has acquired a technical sense; and in that

[1] For a discussion of irregular indorsement, see *post*, §§ 270, 271.

technical sense it means "writing one's name thereon with intent to incur the liability of a party, who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser."[1] In this technical sense it is applicable only to negotiable paper. The indorsement is not only a transfer of a pre-existing negotiable instrument, but it is itself an original independent contract. It is equivalent to the drawing of a new bill on the maker, or drawer and acceptor, as the case may be, of the instrument that is indorsed.[2] It is so independent of the indorsed instrument that at common law the indorser could not be sued in the same action with the drawer, acceptor or maker.[3] And its validity may be affected, like any other contract, and is determined by the circumstances existing when the indorsement was made.[4] The indorsement must also be supported by a consideration.[5]

The term *indorsement* includes also the idea of delivery. An indorsement does not pass title, until the indorsed instrument has been delivered;[6] and, therefore, when a negotiable instrument is said to have been *indorsed* to another, it is understood, unless it is expressly limited in meaning,

[1] 1 Daniel's Negot. Inst., § 666.

[2] Hill *v.* Lewis, 1 Salk. 132; Cundy *v.* Momott, 1 B. & A. 696; Suse *v.* Pompe, 98 E. C. L. R. 538; Sinker *v.* Fletcher, 61 Ind. 276; Kilgore *v.* Bulkley, 14 Conn. 362; Evans *v.* Gee, 11 Pet. 80; Ingalls *v.* Lee, 9 Barb. 947; Van Staphorst *v.* Pearce, 4 Mass. 258; Bellgerry *v.* Branch, 19 Gratt. 418; Brown *v.* Hull, 33 Gratt. 29.

[3] Patterson *v.* Todd, 18 Pa. St. 426; Brown *v.* Hull, 33 Gratt. 29.

[4] Willison *v.* Pattison, 8 Taunt. 439 (2 E. C. L. R.); 1 J. B. Moore, 133; Griswold *v.* Waddington, 16 Johns. 438; Billgerry *v.* Branch, 19 Gratt. 417; Brown *v.* Hull, 33 Gratt. 29.

[5] McKnight *v.* Wheeler, 6 Hill, 492; Sanders *v.* Bacon, 8 Johns. 485; Morrison *v.* Lovell, 4 W. Va. 346; Succession of Weil, 24 La. Ann. 139; Freeman *v.* Bingham, 65 Ga. 580.

[6] Rex *v.* Lambton, 5 Price, 528; Lysaght *v.* Bryant, 9 C. B. (67 E. C. L. R.) 46.

that it has been delivered to that person, and for a valuable consideration.[1]

Acceptance by the indorsee is also necessary to a complete transfer of the title. And if the indorsee declines to accept, and returns the paper, there is no need for any re-indorsement back to the indorser, for the title does not pass out of the indorser, by virtue of the indorsement, until the paper has been delivered to, and accepted by, the indorsee. The indorsee could not afterwards, merely by getting possession of the paper, acquire any title to it, on account of the indorsement. But the same indorsement will answer, if there is a second delivery by the indorser.[2]

§ 257. **When indorsement necessary to pass legal title.** An indorsement is necessary to pass legal title, only when the negotiable instrument is made payable to order.[3] Although the equitable title to such instruments may pass by simple delivery without indorsement or by assignment,[4] the complete title can only be transferred by indorsement and delivery.[5] The negotiability of the paper is not destroyed by the indorsement being made by a corporation under seal.[6]

[1] Adams *v.* Jones, 12 Ad. & El. (40 E. C. L. R.) 455; Lloyd *v.* Howard, 20 L. J. Q. B. (69 E. C. L. R.) 1; 14 Q. B. 995; Green *v.* Steer, 1 Q. B. (40 E. C. L. R.) 707; Hayes *v.* Caulfield, 5 Q. B. (48 E. C. L. R.) 81; Marston *v.* Allen, 8 M. & W. 493; Dunn *v.* Morris, 24 Conn. 333; Bank of Marietta *v.* Pindall, 2 Rand. 475; Freeman's Bank *v.* Ruckman, 16 Gratt. 129; Thomas *v.* Watkins, 16 Wis. 478; Frederick *v.* Wynans, 51 Wis. 472.

[2] 1 Daniel's Negot. Inst., § 665; Cartwright *v.* Williams, 2 Stark. 340.

[3] In Illinois and Alabama, by statute, it is provided that a paper, payable to the payee *or bearer*, must be indorsed, in order to pass title. Garvin *v.* Wiswell, 83 Ill. 218; Hillborn *v.* Artus, 3 Scammon 344; Roosa *v.* Crist, 17 Ill. 191; Wilder *v.* De Wolf, 24 Ill. 191; Blackman *v.* Lehman, 63 Ala. 547.

[4] See *ante*, § 247.

[5] Hopkirk *v.* Page, 2 Brock. 20; Blakely *v.* Grant, 6 Mass. 386; Russell *v.* Swan, 16 Mass. 314; Hestone *v.* Williamson, 2 Bibb, 83.

[6] Rand *v.* Dovey, 83 Pa. St. 280.

§ 257*a*. **Indorsement of instruments payable to bearer.** — The indorsement of instruments payable to bearer, although not necessary to pass the legal title thereto,[1] will impose upon the indorser the same liability as that which rests upon the indorser of paper, payable to order, and requiring indorsement in order to pass the legal title. This liability is sustained to all subsequent holders, whether indorsees or not.[2]

§ 257*b*. **Indorsement of non-negotiable instruments.** — Although it has been held that the indorser of non-negotiable paper is not liable as an indorser on his indorsement, unless he has made the paper "with recourse," or in some other way indicated on the paper his intention to bind himself as an indorser;[3] it is very generally held that the indorsement of a non-negotiable instrument will, as in the case of negotiable paper, make the indorser liable, at least, to his immediate indorsee.[4] This liability exists, not only

[1] In Illinois and Alabama, indorsement is by statute made necessary to pass the legal title of paper payable to bearer. Garvin *v.* Wiswell, 83 Ill. 218; Wilder *v.* DeWolf, 24 Ill. 191; Rosa *v.* Crist, 17 Ill. 191; Hillborn *v.* Artus, 3 Scammon, 344; Blackman *v.* Lehman, 63 Ala. 547.

[2] "The negotiability of a note payable to bearer is certainly not farther restrained by an indorsement in full, than would be by the same indorsement the negotiability of a note payable to order, and indorsed in blank by the payee." Johnson *v.* Mitchell, 50 Tex. 212; Bates *v.* Butler, 46 Me. 387; Smith *v.* Rawson, 61 Ga. 208; Hodge *v.* Steward, 1 Salk. 125; Hill *v.* Lewis, 1 Salk. 132; Brush *v.* Reeves, 3 Johns. 439; Eccles *v.* Ballard, 2 McCord, 388; Burmester *v.* Hogarth, 11 M. & W. 97; Gwinnell *v.* Herbert, 5 Ad. & E. (31 E. C. L. R.) 436; Gilbert *v.* Nantucket Bank, 5 Mass. 97. See *post*, § 270.

[3] Klein *v.* Keiser, 87 Pa. St. 485. See Frevall *v.* Fitch, 5 Whart. 325; Gray *v.* Donahoe, 4 Watts, 400; Samstag *v.* Conley, 64 Mo. 476. In such cases it is held liable only as an ordinary assignor. Campbell *v.* Farmers' Bank, 10 Bush, 152; Story *v.* Lamb, 52 Mich. 525. Thus in case the maker of such paper is insolvent, the indorser is liable to his indorsee for the consideration paid. Whisler *v.* Bragg, 31 Mo. 124.

[4] Hill *v.* Lewis, 1 Salk. 132; Smith *v.* Kendall, 6 T. R. 123; Smallwood *v.* Vernon, 1 Stra. 478; Rex *v* Box, 6 Taunt. 325; Long *v.* Smyser,

when the indorsement is special, but also when it is blank; and it may be likened to the liability of the drawer of a bill or that of a guarantor.[1] The liability is said to differ from the liability of an ordinary indorser of negotiable paper in that it is an absolute guaranty, and not dependent upon a previous demand and notice of non-payment.[2] Another difference between the indorsements of negotiable and non-negotiable paper, as recognized by some of the courts, is that the indorser of non-negotiable paper cannot be sued jointly with the maker, as in the case of negotiable paper.[3]

3 Iowa, 266; Wilson *v.* Ralph, 3 Iowa, 450; Jones *v.* Fales, 4 Mass. 245; Sweetzer *v.* French, 13 Met. 262; Parker *v.* Riddle, 11 Ohio, 102; Smurr *v.* Forman, 1 Ohio, 272; White *v.* Low, 7 Barb. 204; Aldis *v.* Johnson, 1 Vt. 136; Snyder *v.* Oatman, 16 Ind. 265.

[1] "The indorsement and transfer of a non-negotiable note is good, so as to make the indorsers liable to the indorsees, although it will not give an indorsee a right of action in his own name against the maker. The indorsement in such a case is equivalent to the making of a new note. It is a guaranty that the note will be paid. It is a direct and positive undertaking on the part of the indorser to pay the note to the indorsee and not a conditional one to pay, if the maker does not upon demand and after due notice." Sutherland, J., in Seymour *v.* Van Slyck, 8 Wend. 403. See, too, Cromwell *v.* Hewitt, 40 N. Y. 491; Wilson *v.* Mullen, 3 McCord, 236; Bellingham *v.* Bryan, 10 Iowa, 317; Huntington *v.* Harvey, 4 Conn. 124; Perkins *v.* Catlin, 11 Conn. 213; Prentiss *v.* Danielson, 5 Conn. 175; Castle *v.* Candees, 16 Conn. 223; Gorman *v.* Ketcham, 3 Wis. 427. That such an indorsement is the drawing of a new bill. See Matthews *v.* Bloxom, 33 L. J. Q. B. 209; Kobitz *v.* Tempel, 48 Mo. 71; Aldis *v.* Johnson, 1 Vt. 136.

[2] Peddicord *v.* Whittam, 9 Iowa, 471; Cromwell *v.* Hewitt, 40 N. Y. 491; Seymour *v.* Van Slyck, 8 Wend. 403; Gilbert *v.* Seymour, 44 Ga. 63; Plimley *v.* Westley, 2 Scott, 423. But it must be shown that there has been due diligence in securing the payment from the maker or drawer. Castle *v.* Candee, 16 Conn. 223; Welton *v.* Scott, 4 Conn. 527; Wilson *v.* Mullen, 3 McCord, 236; Benton *v.* Gibson, 1 Hill (S. C.), 56. But in North Carolina, it is held that notice of non-payment must be given, as in the case of negotiable instruments in order to hold the indorser of a non-negotiable instrument liable. Sutton *v.* Owen, 65 N. C. 123.

[3] First Nat. Bank of Trenton *v.* Gay, 71 Mo. 627; Cochran *v.* Strong, 44 Ga. 636.

But it seems that in order that a non-negotiable instrument may be indorsed, and the indorser assume the ordinary liability of an indorser, the instrument must fall under the head of commercial paper; in other words, it must be *quasi*-negotiable. Thus the indorsement of a judgment on a note does not create the liability of an indorser.[1]

Finally, the indorsement of a non-negotiable instrument does not give a cause of action to any one but the immediate indorsee.[2] A subsequent indorsee cannot sue on the indorsement, unless such an agreement is expressly made by the indorser, as, for example, when the indorsement is made to the order of the indorsee named. Such an indorsement makes the instrument negotiable as to the holder and indorsers, although it is non-negotiable as to the primary obligor.[3]

§ 258. **Indorsements cannot be partial.** — If a payee attempts to make a partial indorsement of the instrument, it will operate as a good assignment of a part interest in the instrument,[4] but it will not give the assignee the rights and power of an indorsee.[5] But if the indorsement on its face is in full, the collateral agreement that the indorsee is to hold a part of the amount in trust for the indorser or

[1] Kelsey *v.* McLaughlin, 76 Ind. 379.

[2] Helfer *v.* Alden, 3 Minn. 332; Ransom *v.* Sherwood, 26 Conn. 437; Jones *v.* Wood, 3 A. K. Marsh. 162; Raymond *v.* Middleton, 29 Pa. St. 529. But see Josselyn *v.* Ames, 3 Mass. 274; Seymour *v.* Van Slyck, 8 Wend. 421; Codwise *v.* Gleason, 3 Day, 12.

[3] Caruth *v.* Walker, 8 Wis. 252. See as to special contracts on the liability of the indorser, Hackney *v.* Jones, 3 Humph. 612; Whiteman *v.* Childress, 6 Humph. 302; Tucker *v.* English, 2 Spears, 673; Parker *v.* Kennedy, 1 Bay, 398; Pratt *v.* Thomas, 2 Hill (S. C.), 654; Kirkpatrick *v.* McCullough, 3 Humph. 171.

[4] Groves *v.* Ruby, 24 Ind. 418; Hutchinson *v.* Simon, 57 Miss. 628.

[5] Hawkins *v.* Cardy, 1 Ld. Raym. 160; Hughes *v.* Kiddell, 2 Bay, 324; Lindsay *v.* Price, 33 Tex. 282; Planters' Bank *v.* Evans, 35 Tex. 592; Frank *v.* Kingler, 36 Tex. 305

some other person, will not affect the character of the indorsement.[1] And it will also be a good indorsement if a part of the face value is given to one person, and the residue to another person. There may be two or more joint indorsees, but they must all join in any action on the paper.[2]

§ 259. **The liability of an indorser.** — The indorser, like the assignor of negotiable paper, payable to bearer, warrants by implication that the paper is a valid obligation in every particular: in the first place, that all the parties were competent to contract. If the maker, drawer, acceptor, or indorser is laboring under some legal disability, the paper is invalid so far as his liability is concerned, and the subsequent indorser is responsible for the loss thus occasioned.[3]

[1] Reed *v.* Furnival, 16 C. & M. 538; 5 C. & P. (24 E. C. L. R.) 499.

[2] Flint *v.* Flint, 6 Allen, 36, Dewey, J., saying: "This action was properly instituted in the names of the present plaintiffs, the indorsement of the entire note being made to the indorsees, and the claim, as respects the maker, not being divisible into two separate causes of action. The delivery to one of the indorsees, and a suit instituted and carried on for the benefit of both, with their concurrence, show a sufficient acceptance of the transfer to them." In this case the indorsement was "Pay one-half of the within note to S. F., and the other half to E. B." See also to same effect, Conover *v.* Earl, 26 Iowa, 167.

[3] Haly *v.* Lane, 2 Atk. 181; Lambert *v.* Oakes, 1 Ld. Raym. 443; 12 Mod. 244; Bowman *v.* Hiller, 130 Mass. 153; Lambert *v.* Pack, 1 Salk. 127; Critchlow *v.* Parry, 2 Camp. 182; Kenworthy *v.* Sawyer, 125 Mass. 28; Archer *v.* Shea, 21 N. Y. S. C. (14 Hun) 493; Erwin *v.* Downs, 15 N. Y. 575; Burrill *v.* Smith, 7 Pick. 291; Prescott-Bank *v.* Caverly, 7 Gray, 217; Butler *v.* Slocomb, 33 La. Ann. 170; Robertson *v.* Allen, 59 Tenn. 233. It has been questioned whether the indorser warrants the capacity of all the antecedent parties; Chitty on Bills, [*243] 277; East India Co. *v.* Tritton, 3 B. & C. 280; Smith *v.* Mercer, 6 Taunt. 83, dissenting opinion of Chambre, J.; but the weight of authority is to the effect that the warranty extends to all the antecedent parties to the instrument, 1 Parsons' N. & B. 25, 588; Story on Notes, § 380; Story on Bills, § 110; Dalrymple *v.* Hillenbrand, 9 N. Y. S. C. (2 Hun) 488, affirmed in 62 N. Y. 5; Turner *v.* Heller, 66 N. Y. 66; Harris *v.* Bradley, 7 Yerg. 310.

The indorser also warrants the genuineness of all the signatures to the paper.[1] It has also been doubted whether the indorser warrants the genuineness of the prior indorsements.[2] But this is not the conclusion of the authorities. Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective;[3] and since no title passes on a forged indorsement,[4] it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements.[5]

The indorser also warrants that the paper is not invalid, because its execution violates some law of the land, for

[1] McIntosh *v.* Haydon, R. & M. 362; Critchlow *v.* Parry, 2 Camp. 182; Mosher *v.* Carpenter, 13 Hun, 602; Howe *v.* Merrill, 5 Cush. 83; Hannum *v.* Richardson, 48 Vt. 508; Heylyn *v.* Adamson, 2 Burr. 669; Mosher *v.* Carpenter, 20 N. Y. S. C. (13 Hun) 604; MacGregor *v.* Rhodes, 25 L. J. Q. B. 318; Harris *v.* Bradley, 7 Yerg. 310; Murray *v.* Judah, 16 Cow. 484; Terry *v.* Bissell, 26 Conn. 23; Aldrich *v.* Jackson, 5 R. I. 218; Coggill *v.* Am. Exch. Bank, 1 Comst. 113; Turnbull *v.* Bowyer, 40 N. Y. 456; Ollivier *v.* Audray, 7 La. 496; Chapman *v.* Rose, 56 N. Y. 137; Condon *v.* Pearce, 43 Md. 83; Strange *v.* Elleson, 2 Bailey, 385. But, of course, the indorsee can not hold the indorser liable, if the former procured an indorsement of a forged paper to himself with knowledge of the forgery. Turner *v.* Keller, 66 N. Y. 66; Mosher *v.* Carpenter, 20 N. Y. S. C. (13 Hun) 604.

[2] Bayley on Bills, 170, citing East India Co. *v.* Tritton, 3 B. & C. 280.

[3] Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633; Heylyn *v.* Adamson, 2 Burr. 669; Cochran *v.* Atchison, 27 Kan. (1882), 728; Ballingalls *v.* Gloster, 3 East, 483; State Bank *v.* Fearing, 15 Pick. 533; Dalrymple *v.* Hillenbrand, 2 Hun, 48; *s. c.* 60 N. Y. 5; White *v.* Continental Nat. Bank, 64 N. Y. 320; Fish *v.* First National Bank, 42 Mich. 203; Ogden *v.* Saunders, 12 Wheat. 313; Redington *v.* Wood, 45 Cal. 406; Bruce *v.* Bruce, 1 Marsh. 165; *s. c.* 5 Taunt. 485; Mills *v.* Barney, 22 Cal. 240.

[4] Graves *v.* Am. Exch. Bank, 17 N. Y. 205; Colson *v.* Arnot, 57 N. Y. 253.

[5] Fish *v.* First Nat. Bank, 42 Mich. 204; Chambers *v.* Union Nat. Bank, 78 Pa. St. 205; Cochran *v.* Atchison, 27 Kan. (1882), 728; Canal Bank *v.* Bank of Albany, 1 Hill 287; Williams *v.* Tishomingo Sav. Inst., 57 Miss. 633; Star F. Ins. Co. *v.* N. H. Bank, 60 N. H. (1884) 442; Dalrymple *v.* Hillenbrand, 62 N. Y. 5.

example, the law against usury or against gambling.[1] If the paper is void because illegal, the indorser is liable to the innocent indorsee for value. But if the indorsee participates in any way in the illegal transaction by which the paper is made illegal, he cannot hold the indorser.[2] The indorsee, in such a case, may either sue the indorser upon the paper itself, or upon a count for money had and received.[3]

Finally, — and in this the indorser's liability differs from that of the assignor of negotiable paper, payable to bearer, — the indorser guarantees that the paper will be honored by the original parties at maturity and if it be a bill, it will be accepted when it is presented. If it should be dishonored by the original parties, the holder may proceed at once against the indorsers, after giving them the required notice of non-acceptance or of non-payment.[4] The indorser cannot be held liable on the implied warranty as to acceptance and payment of the instrument, unless a demand is proved, and the proper notice is given. But the indorsee need not make any demand, in order to hold the indorsers liable on any of the other implied warranties. He may bring suit

[1] Bowyer *v.* Bampton, 2 Strange, 1155; Edwards *v.* Dick, 4 Barn. & Ald. 212; Railroad Co. *v.* Schulte, 103 U. S. 145; Unger *v.* Boas, 1 Harris, 601; Tompkins *v.* Little Rock Ry. Co., 15 Fed. Rep. 6; Morford *v.* Davis, 28 N. Y. 484; Burrill *v.* Smith, 7 Pick. 291; Frank *v.* Longstreet, 44 Ga. 185; Howell *v.* Wilson, 2 Blackf. 418; Henderson *v.* Fox, 5 Ind. 489; Fish *v.* First, Nat. Bank, 42 Mich. 404; Moffett *v.* Bickel, 21 Gratt. 283; Lyons *v* Miller, 69 Gratt. 427; Brown *v.* Wilcox, 7 Iowa, 414; Wilson *v.* Binford, 81 Ind. 588; Huston *v.* First Nat. Bk., 85 Ind. 21; Graham *v.* Maguire, 39 Ga. 531. Succession of Weil, 24 La. Ann. 193; Hazzard *v.* Citizens' Bank, 72 Ind. 130; National Bank of Pittsburg *v.* Wheeler, 60 N. Y. 612; Stewart *v.* Bramhall, 74 N. Y. 85; Rosa *v.* Butterfield, 33 N. Y. 664.

[2] Ackland *v.* Pearce, 2 Camp. 599; Edwards *v.* Dick., 4 B. & Ald. 212; Turner *v.* Keller, 66 N. Y. 66.

[3] Cundy *v.* Marriott, 1 B. & A. 696; Ingalls *v.* Lee, 9 Barb. 947.

[4] Ballingalls *v.* Gloster, 3 East, 481; 4 Esp. 268; Smith *v.* Johnson, 27 L. J. Ex. 363; 3 H. & N. 222; Ogden *v.* Saunders, 12 Wheat. 313.

against the indorsers immediately after discovery of the breach of the warranties.[1] It has, however, been held that there must always be a demand and notice, in order to hold an accommodation indorser.[2]

§ 260. **Liability of indorser "without recourse"— Qualified indorsements.** — When an indorsement is made "without recourse," the indorser relieves himself of all liability for the dishonor of the paper.[3] But, whatever popular impression it may produce, such an indorsement is not recognized in law as having cast any suspicion upon the character of the paper, or the financial responsibility of the parties to it.[4]

The words "without recourse" are usually employed to qualify the liability of the indorser; but it is not necessary to use those particular words. Other words, which clearly indicate the intention to create the qualification, such as "at the indorsee's own risk," would suffice. Even words of less significance have been held sufficient to qualify the indorsement.[5]

[1] Copp *v.* M'Dugall, 9 Mass. 1; Cochran *v.* Atchison, 27 Kan. 728; Lake *v.* Haynes, 1 Atk. 281; Ballingalls *v.* Gloster, 3 East, 483; Heylin *v.* Adamson, 2 Burr. 669.

[2] Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207.

[3] Welch *v.* Linds, 1 Cranch 159; Wilson *v.* Codman's Exrs., 3 Cranch, 192; Rice *v.* Stearns, 3 Mass. 225; Upham *v.* Prince, 12 Mass. 13; Richardson *v.* Lincoln, 5 Met. 201; Fitchburg Bank *v.* Greenwood, 2 Allen, 431; Mott *v.* Hicks, 1 Cow. 512; Craft *v.* Fleming, 56 Pa. St. 140; Borden *v.* Clark, 26 Mich. 410; Davenport *v.* Schram, 9 Wis. 119; Cady *v.* Shepard, 12 Wis. 639; Lyon *v.* Ewing, 17 Wis. 61; Lawrence *v.* Dobyn, 30 Mo. 196.

[4] Lomax *v.* Picot, 2 Rand. 260; Stevenson *v.* O'Neil, 71 Ill. 314; Kelley *v.* Whitney, 45 Wis. 117.

[5] The following indorsement was held to be qualified: "I transfer all my right and title to the within note, to be enjoyed in the same manner as may have been by me." Halley *v.* Talconer, 32 Ala. 536. See Aniba *v.* Yeomans, 39 Mich. 171; Sears *v.* Lantz, 47 Iowa, 658. But in New York, where the firm of Brander & Hubbard was dissolved, and a new firm by

Contrary to a more or less popular notion, the indorser "without recourse" is liable, (1) if any one or more of the signatures are not genuine;[1] (2) if any of the parties are incompetent to make contracts; (3) if the indorser has a defective title;[2] (4) or if the paper is invalid, because of the want or illegality of the consideration[3] or for any cause, such as fraud[4] or that the note or bill has been already paid.[5] This liability seems to attach to the indorser "without recourse," even though the indorsement is made after maturity.[6]

§ 261. **Successive indorsements — When liable to each other for contribution.** — Indorsers guarantee the payment of the instrument to all subsequent indorsees, and therefore they are liable in case of non-payment in the order in which their indorsements were made, each indorser being liable for the whole amount of the bill or note to every subsequent indorser and indorsee, but not to the prior indorsers. This

the same name was formed by Hubbard with others, and some paper of the old firm was transferred by Hubbard, indorsed "Brander & Hubbard, old firm in liquidation," it was held not to constitute a qualified indorsement, and that the indorsee was liable on the indorsement as a guarantor of payment. Fassin *v.* Hubbard, 55 N. Y. 470.

[1] Dumont *v.* Williamson, 18 Ohio St. 515.

[2] Challis *v.* McCrum, 22 Kan. 157.

[3] Blething *v.* Lovering, 58 Me. 437; Hannum *v.* Richardson, 48 Vt. 508; Challis *v.* McCrum, 22 Kan. 157. See *contra*, Rayne *v.* Dills, 27 La. Ann. 622.

[4] Watson *v.* Cheshire, 18 Iowa, 202.

[5] Ticonic Bank *v.* Smiley, 27 Me. 225. In Mays *v.* Callison, 6 Leigh, 230, where the instrument was a bond, Carr, J., said: "The very possession of the bond, the claiming it as property, as something binding the obligors, precluded the idea that it was at that moment discharged or satisfied; for then it was no bond; it bound nobody, it was not the representative of money. The bond, too, was payable at a future date; who could have dreamed that it was already mere wax and paper — not a cent due on it?"

[6] Ticonic Bank *v.* Smiley, 27 Me. 225. But see Ober *v.* Goodrich, 27 Gratt. 878.

is the general rule, and their indorsements are presumed to come in the order in which they appear on the instrument. But, as between themselves and subsequent indorsees having notice, the order may be changed by special agreements, so that an indorsement may be treated as prior, although it appears to be subsequent.[1] There is no liability for contribution among successive indorsers, as a general rule, even when there are accommodation indorsers, unless it is provided for by special agreement.[2] But if the second of two accommodation indorsers is provided by the maker or acceptor with the means to make payment, the prior indorser may sue this subsequent indorser to compel him to appropriate the money thus received to the payment of the paper.[3]

If two indorsers appear on the face of the paper to have been joint payees or indorsees, their indorsements must be treated as joint, although apparently successive.[4]

[1] Slack *v.* Kirk, 67 Pa. St. 380; Chalmers *v.* McMurdo, 5 Munf. 252; Slagle *v.* Rust, 4 Gratt. 274; Cahal *v.* Frierson, 3 Humph. 411; Brockway *v.* Comparree, 11 Humph. 355; Caddy *v.* Sheppard, 12 Wis. 639; Syme *v.* Browne, 19 La. Ann. 147; Bradford *v.* Cory, 5 Barb. 461; Hale *v.* Danforth, 46 Wis. 554; Price *v.* Lavender, 38 La. Ann. 389; Freeman *v.* Ellison, 37 Mich. 459; Givens *v.* Merchants' Nat. Bank, 85 Ill. 442; Hacket *v.* Lenares, 16 La. Ann. 204; Pomeroy *v.* Clark, 1 MacArth. 606; Bogue *v.* Melick, 25 Ill. 91.

[2] Phillips *v.* Preston, 5 How. 278; McCarty *v.* Roots, 21 How. 432; Rey *v.* Simpson, 22 How. 350; McDonald *v.* Magruder, 3 Pet. 470; Shaw *v.* Knox, 98 Mass. 214; Clapp *v.* Rice, 13 Gray, 403; Sweet *v.* McAlister, 4 Allen, 355; Weston *v.* Chamberlain, 7 Cush. 404; Woodward *v.* Severance, 7 Allen, 340; Smith *v.* Merrill, 54 Me. 48; Coolidge *v.* Wiggin, 62 Me. 568; Kirkner *v.* Conklin, 40 Conn. 81; Easterly *v.* Barber, 66 N. Y. 433; Moody *v.* Findley, 43 Ala. 167; Ross *v.* Espy, 66 Pa. St. 481; Gore *v.* Wilson, 40 Ind. 206; Davis *v.* Morgan, 64 N. C. 576; Syme *v.* Brown, 19 La. Ann. 147; Givens *v.* Merchants' Nat. Bank, 85 Ill. 443; Hale *v.* Danforth, 46 Wis. 555; Druhe *v.* Christy, 10 Mo. App. 566; Hogue *v.* Davis, 9 Gratt. 4; Bank of U. S. *v.* Beirne, 1 Gratt. 265; Chalmers *v.* McMurdo, 5 Munf. 552; Farmers' Bank *v.* Vanmeter, 4 Rand. 553.

[3] Price *v.* Truesdell, 28 N. J. Eq. 20.

[4] Lane *v.* Stacey, 8 Allen, 41. See Culver *v.* Leavy, 19 La. Ann. 202.

But the presumption is rather against a joint indorsement, where the two indorsers do not appear on the face of the paper to have been joint payees or indorsees.[1] In a late case in New Jersey, it has been held that parol evidence is inadmissible to prove that an apparently successive indorsement was intended by the parties to be a joint indorsement.[2] But this case is not in harmony with the general trend of authority, which allows as between the immediate parties and others having notice, every mistake made in the order of indorsement to be proved by parol evidence and corrected in equity.[3]

Where a paper is indorsed by the payee and by a third person, the legal presumption is that the payee is the prior indorser; but this presumption may be rebutted by proof to the contrary.[4] And even between the immediate parties, the accommodation indorsers will be liable in the order of their indorsements, in the absence of an agreement to the contrary.[5] Only an express agreement can make them sustain to each other the relation of co-sureties.[6] The agreement may be proved by parol evidence, as between the immediate parties,[7] but not against a remote holder for

[1] Givens *v.* Merchants' Nat. Bank, 85 Ill. 443; Hale *v.* Danforth, 46 Wis. 555.

[2] Johnson *v.* Ramsey, 42 N. J. L. (14 Vroom) 279.

[3] Slack *v.* Kirk, 67 Pa. St. 380; Cahal *v.* Frierson, 3 Humph. 411; Brockway *v.* Comparree, 11 Humph. 355; Slagle *v.* Rust, 4 Gratt. 274.

[4] Slagle *v.* Rust, 4 Gratt. 274; Caddy *v.* Sheppard, 12 Wis. 639.

[5] Shaw *v.* Knox, 98 Mass. 214; Woodward *v.* Severance, 7 Allen, 340; Coolidge *v.* Wiggin, 62 Me. 568; Kirschner *v.* Conklin, 40 Conn. 77; Bank of United States *v.* Beirne, 1 Gratt. 239; Moody *v.* Findley, 43 Ala. 167; Druhe *v.* Christy, 10 Mo. App. 566.

[6] McCune *v.* Belt, 25 Mo. 174; Stillwell *v.* How, 46 Mo. 589, McDonald *v.* Magruder, 3 Pet. 470; McCarty *v.* Roots, 21 How. 437; Kirschner *v.* Conklin, 40 Conn. 81; Hogue *v.* Davis, 8 Gratt. 4; Farmers' Bank *v.* Van Meter, 4 Rand. 553. The burden of proof is on the party alleging the varying agreement. Hogue *v.* Davis, *supra*. And it must be a positive and well established agreement. Sweet *v.* McAlister, 4 Allen, 353.

[7] Smith *v.* Morrill, 54 Me. 48; Coolidge *v.* Wiggin, 62 Me. 568; Stur-

value.[1] Where the indorsers are joint payees, it is presumed that they are joint indorsers.[2]

§ 262. **By whom the indorsement can be made.** — Any person, who is not laboring under some legal disability, who is payee or indorsee of a negotiable bill or note, can make a legal indorsement of the instrument. If the payee or indorsee dies, the bill or note passes to the executor or administrator, and it must be indorsed by the latter.[3] Where the payee or indorser becomes bankrupt, his power of indorsement passes to his assignee in bankruptcy and the latter is alone authorized to indorse the instruments.[4]

If the bill or note is payable to an infant or lunatic, an indorsement by him will pass a good title to the paper, as against all the world but himself. But he is privileged to avoid the indorsement, release himself from liability and recover the instrument too.[5]

According to the common law, the husband, by reducing his wife's *choses in action* to possession, acquires the con-

tevant *v.* Randall, 53 Me. 149; Cahal *v.* Frierson, 3 Humph. 411; Weston *v.* Chamberlain, 7 Cush. 404; Easterley *v.* Barber, 66 N. Y. 433; Hubbard *v.* Guernsey, 64 N. Y. 457; Denton *v.* Lytle, 4 Bush, 597; Edelen *v.* White, 6 Bush, 408; Phillips *v.* Preston, 5 How. 278. But see Johnson *v.* Ramsey, 14 Vroom, 279.

[1] Williams *v.* Smith, 48 Me. 135.

[2] Lane *v.* Stacy, 8 Allen, 41; Culver *v.* Leavy, 19 La. Ann. 202.

[3] Rawlinson *v.* Stone, 3 Wils. 1; Watkins *v.* Maule, 2 Jac. & Walk. 237; Malbon *v.* Southard, 36 Me. 147; Raud *v.* Hubard, 4 Met. 252; Nelson *v.* Stallenwerck, 60 Ala. 140; Shelton *v.* Carpenter, 60 Ala. 211; Dwight *v.* Newell, 15 Ill. 333. See *ante*, § 148, for a full discussion of the executor and administrator as payee and indorser, and § 146, of trustees and guardians as indorser.

[4] Ex parte Brown, 1 Glyn & J. 407; Ashurst *v.* Bank of Australia, 37 Eng. L. & Eq. 149. See *ante*, § 65, for a fuller discussion.

[5] Jeune *v.* Ward, 3 Stark. 326; Grey *v.* Cooper, 3 Doug. 65; Taylor *v.* Croker, 4 Esp. 187; Hardy *v.* Waters, 38 Me. 450, Nightingale *v.* Withington, 15 Mass. 272; Burke *v.* Allen, 29 N. H. 106; Frasier *v.* Massey, 14 Ind. 382. For a fuller discussion on the infant as payee and indorser, see *ante*, § 49, and on the Lunatic, see *ante*, § 56.

trol of all of them, and he alone can indorse the negotiable bills payable to her.[1] But the husband may authorize the wife to indorse her negotiable paper, and her indorsement, with his consent, is equivalent to his own indorsement, and passes a perfect title.[2] But the common law has been greatly modified in respect to the married woman's powers and capacities, by modern statutes; and in some of the States the common law in this connection has been completely abrogated, and the married woman given the same power of control over her property, as the single woman has.[3]

If the paper is payable to a copartnership, any one of the firm may indorse it during the continuance of the firm. But in order to pass a perfect title, and bind the firm as indorser, the indorsement must be in the firm's name.[4] If one partner dies, the survivor may indorse in his own name, for he becomes the administrator of the dissolved firm.[5] But when a firm is dissolved for any other cause than the death of a partner, no partner can indorse the firm's paper, not even the partner who has the power to wind up the affairs of the firm.[6]

[1] Conner *v.* Martin, 1 Stra. 516; Barlow *v.* Bishop, 1 East, 433; Savage *v.* King, 5 Shep. 301; Mason *v.* Morgan, 2 Ad. & El. (29 E. C. L. R.) 30; Miles *v.* Williams, 10 Mod. 243; Miller *v.* Delameter, 12 Wend. 433.

[2] Lindus *v.* Bradwell, 5 Com. B. 583; Lord *v.* Hall, 8 C. B. 627; Cotes *v.* Davis, 1 Camp. 485; Prestwick *v.* Marshall, 7 Bing. 565; 4 C. & P. 594; Prince *v.* Brunatter, 7 Bing. N. C. 435; Hancock Bank *v.* Joy, 41 Me. 568; Stevens *v.* Beal, 10 Cush. 291; Miller *v.* Delaweter, 12 Wend. 433; Reakert *v.* Sanford, 5 Watts & S. 164; Leeds *v.* Vail, 15 Pa. St. 185; Fredd *v.* Eves, 4 Harr. (Del.) 385.

[3] For a full discussion of the married woman's disabilities, and particularly in respect to her as payee and indorser, see *ante*, § 63.

[4] Absolem *v.* Marks, 11 Q. B. 19; Russell *v.* Swan, 16 Mass. 314; Estabrook *v.* Smith, 6 Gray, 570; Moore *v.* Denslow, 14 Conn. 235; Hooker *v.* Gallagher, 6 Fla. 351; Fletcher *v.* Dana, 4 Blackf. 377; Desha *v.* Stewart, 6 Ala. 852. See chapter VI. for a discussion of powers of partners as parties to commercial papers.

[5] Jones *v.* Thorne, 14 Mart. 463.

[6] Abel *v.* Sutton, 3 Esp. 108: Parker *v.* Macomber, 18 Pick. 505; San-

Where a paper is payable to two or more persons who are not partners, it must be indorsed by all, in order that the transfer may pass the whole title and operate in every other way as an indorsement. The indorsement by one of them will transfer his equitable interest, but nothing more; the indorsee of one of the parties could not maintain an action on the paper.[1] But if the instrument is expressed to be payable to either of the payees, the indorsement of one of them would be sufficient.[2]

When a corporation is the payee, of course the indorsement can only be made by some agent of the corporation. In regard to indorsements by agents of corporations in general, special care must be taken, in order to make it the indorsement of the corporation, and binding on it as such.[3] But cashiers of banks constitute a notable exception to this rule; and custom, adopted by law, has made any form of an indorsement by a cashier the indorsement of his bank, which shows in any way that he is acting in his official capacity.[4] The same rule applies to all government officers.

ford *v.* Mickles, 4 Johns. 224; Foltz *v.* Pouree, 2 Desau. Eq. 40; Hampshire *v.* Chastain, 5 Ga. 166. But it has been held that the indorsement by the managing partner after dissolution will be good, if the dissolution were unknown to the indorsee. Lewis *v.* Reilly, 1 Q. B. 349; Cony *v.* Wheelock, 33 Me. 366. See *ante*, § 108, for a discussion of the power to indorse the firm's notes and bills after dissolution.

[1] Cavenick *v.* Vickery, 2 Dougl. 652; Brown *v.* Dickinson, 27 Gratt. 693; Sneed *v.* Mitchell, 1 Haywood, 289; Smith *v.* Whiting, 9 Mass. 334; Sayre *v.* Frick, 7 Watts & S. 383; Culver *v.* Leavy, 19 La. Ann. 202; Ryhiner *v.* Feickert, 92 Ill. 311. See *ante*, § 18. Of course, one may be authorized by the others to indorse for all, and with that authority the one must sign all their names to the indorsement. If a joint payee assigns his interest to another payee, the assignment carries with it the implied power to indorse the paper in his name. Russell *v.* Swan, 16 Mass. 314; Goddard *v.* Lyman, 14 Pick. 268.

[2] Watson *v.* Evans, 1 Hurl. *v.* Colt. 662.

[3] See *ante*, § 126.

[4] Fleckner *v.* Bank of U. S., 8 Wheat. 360; Minor *v.* Mechanics' Bank, 1 Pet. 46; Wild *v.* Passamaquoddy Bank, 3 Mason, 505; Fairfield *v.* Adams, 16 Pick. 381; Folger *v.* Chase, 18 Pick. 63; Bank of Manchester *v.* Slasen,

Merely affixing their official designations to the indorsement will make it binding on the government, instead of on themselves as individuals.[1]

§ 263. **To whom the indorsement may be made.** — The indorsement may be made to almost any one, and probably, at common law, there is but one absolute prohibition, viz.: the indorsement by a wife to her husband, or by the husband to his wife.[2] The indorsement may be made to all the persons laboring under disabilities, such as infants, lunatics, and married women. But in the case of the married women, the papers indorsed to them become the property of their husbands at common law.[3]

Where the bill or note is indorsed to an executor, administrater or trustee, although he will hold the proceeds of the collection as a representative of his beneficiary, he will take the paper in his individual capacity, and in transferring it, it is proper for him to indorse it in his own name.[4] In any event, the indorsement is invalid, for any negotiable purpose, if the indorsee is dead, when the indorsement is made. The personal representative could not sue on such a paper.[5]

§ 264. **The place for indorsement — Allonge.**—As has been already explained, the word "indorsement" is derived

13 Vt. 334; Porter *v.* Neckervis, 4 Rand. 359; Bank of the State *v.* Muskingum Branch Bank, 29 N. Y. 619; McHenry *v.* Ridgely, 3 Scam. 309; Collins *v.* Johnson, 16 Ga. 458. See *ante*, § 127.

[1] Dugan *v.* United States, 3 Wheat. 172. See *ante*, §§ 137, 139.

[2] Gay *v.* Kingsley, 11 Allen, 345. But such an indorsement may be made for the purpose of enabling the indorsee to act as the agent of the indorser in the collection of the debt. Slawson *v.* Loring, 5 Allen, 340.

[3] Richards *v.* Richards, 2 Barn. & Ad. 477; Philliskirk *v.* Pluckwell, 2 M. & Selw. 393; Burrough *v.* Moss, 10 Barn. & C. 558. See *ante*, § 63.

[4] Evans *v.* Cramlington, 1 Show. 4; 2 Show. 509; Richards *v.* Richards, 2 Barn. & Ad. 447; Davis *v.* Peck, 54 Barb. 425; Fletcher *v.* Schaumberg, 41 Mo. 501. See *ante*, §§ 146, 148.

[5] Valentine *v.* Holloman, 63 N. C. 475.

from the Latin *in dorsa* and means a writing *on the back* of a commercial instrument. But in order that a signature and other accompanying writing may have the full effect of an indorsement, it is not necessary that it be put on the back. It may be written on any part of the instrument, and it will be valid, although unusual and irregular; but in consequence of the irregularity it must be proven to be an indorsement, if disputed.[1]

But the writing must appear on some part of the instrument, in order to have the effect of an indorsement. Although there can be a valid transfer of a bill or note by a separate instrument in writing, the separate writing will not give to the transferee the rights of an indorsee for value.[2] If, however, in consequence of frequent and numerous negotiations of the instrument, the successive indorsements have completely covered the back, an extra piece of paper may be tacked or pasted on the instrument, and all further indorsements may be written on this attached paper. This attached paper is called an *allonge*, and becomes a part of the instrument for this purpose.[3]

§ 265. Form of the indorsement. — According to the character of the indorsement, it will consist simply of the

[1] Armfield *v.* Allport, 27 L. J. Ex. 42; Young *v.* Glover, 3 Jurist (N. S.), 637; Rex *v.* Begg, 3 P. Wms. 419; 1 Stra. 18; Partridge *v.* Davis, 20 Vt. 449; Haines *v.* Dubois, 30 N. J. 259; Quin *v.* Sterne, 26 Ga. 223; Herring *v.* Woodhull, 29 Ill. 92; Arnot *v.* Symonds, 85 Pa. St. 99. See Marion Gravel Road Co. *v.* Kessinger, 66 Ind. 553; 2 Parsons' N. & B. 18.

[2] Fenn *v.* Harrison, 3 T. R. 757. But a promise to indorse can be enforced against the promisor, if it is supported by a valid consideration. Moxon *v.* Pulling, 4 Camp. 51; Wilmington Bank *v.* Houston, 1 Harr. 227; French *v.* Turner, 15 Ind. 59.

[3] Folger *v.* Chase, 18 Pick. 63; French *v.* Turner, 15 Ind. 59; Crosby *v.* Roub, 16 Wis. 622, 626; Young *v.* Glover, 3 Jurist (N. S.), 637; Byles on Bills, [*145] 263; Edwards on Bills, 267; Story on Notes, §§ 121, 151, 172; Story on Bills, §§ 204, 218.

payee or last indorsee's signature, or of the signature, accompanied by words which express the intention to transfer the paper.

The full name should be given in the signature, and it is usual to do so, but the initials will answer.[1] Indeed any mark, which was intended by the parties to be a signing, will be sufficient in law. It was held in one case that the figures "1, 2, 8," placed on the back of a commercial instrument with intention to indorse it, will bind the party writing them as an indorser.[2]

The writing may be made with a pen and ink or with a pencil.[3]

If the indorsement does not consist simply of the signature, it is usually accompanied by the words "pay to A. or order," [or bearer] or "pay to the order of A." But it is not necessary to adopt this formula, although it is usual and customary. Other forms of expression, indicating the intention to transfer the paper, and containing no language having the effect of limiting the liability of the tranferrer, have been held sufficient to bind the transferrer as an indorser. The words "assign" and "sell and assign," have been accepted as sufficient to constitute an indorsement.[4] And in England the most redundant and verbose sort of an assignment, written on the back of the paper, has been held to have the effect of an ordinary indorsement.[5]

[1] Williamson *v.* Johnson, 1 B. & C. 146; Merchants' Bank *v.* Spicer, 6 Wend. 443; Palmer *v.* Stephens, 1 Denio, 471; Rogers *v.* Colt, 6 Hill, 322; Bank *v.* Flanders, 6 N. H. 239; Corgan *v.* Frew, 39 Ill 31.

[2] Brown *v.* Butcher's Bank, 6 Hill, 443. See also to the same effect, Addy *v.* Grix, 8 Ves. 504; George *v.* Surrey, 1 M. & M. 516; Baker *v.* Denning, 8 Ad. & El. 94; Flint *v.* Flint, 6 Allen, 34.

[3] Geary *v.* Physic, 5 Barn. & C. 234; Closson *v.* Stearns, 4 Vt. 11; Brown *v.* Butchers' Bank, 6 Hill, 443.

[4] Sears *v.* Lantz, 47 Iowa, 658; Sands *v.* Wood, 21 Iowa, 263; Duffy *v.* O'Connor, 7 Baxt. 498; Shelby *v.* Judd, 24 Kan. 166.

[5] The indorsement in that case was as follows: "I hereby assign this

But in Michigan, in a case where the payee wrote on the back of a note, "I hereby transfer my right, title and interest of the written note to S. A. Yeomans," is was held to be a good transfer of the payee's rights in and to the note, but it was not an indorsement.[1] The declaration that the payee assigns or transfers *all his right, title and interest* in the paper, would seem to limit in a most effective way the rights acquired by the transferee to those which the transferrer had therein, and thus prevent the writing from operating as an indorsement. But there are authorities which oppose this view, and hold that nothing but an express limitation of the rights of the transferee to those

draft and all benefit of the money secured thereby to John Grainger of Bessilsleigh, in the County of Berks, labourer; and order the within named Thomas Fox Hitchcock to pay him the amount and all interest in respect thereof." Gurney, B., said: "It amounts to nothing more than an ordinary indorsement of the note, but it is in a very elaborate form." Richards *v.* Frankum, 9 Car. & P. (38 E. C. L. R.) 221.

[1] Aniba *v.* Yeomans, 39 Mich. 171, Marston, J., saying: "The indorsement upon a negotiable promissory note is something more than the mere transfer of the interest of the payee therein. It includes also the personal undertaking of the indorser that if the note is not paid at maturity, upon notice of that fact he will pay the same. Indeed it goes farther and may pass a perfect title to the indorsee, and enable him to recover from the makers, in cases where the payee could not have recovered. The right or interest passing therefore under the usual and customary indorsement is much greater than the mere right, title and interest of the payee, and where the transfer as made only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass. The transfer in this case gave Yeomans the same rights that Aniba then had, but none other or greater. Yeomans could look to the makers thereof as Aniba could have done, but beyond this he could not go. To permit him to fall back upon Aniba, or to collect from the makers in case Aniba could not have collected, would be giving him more than Aniba's right and interest in the note. Such a transfer as was made in this case, it not being in accordance with the usual and customary method of transferring commercial paper, would throw doubt and suspicion upon the entire transaction and destroy the negotiable character of the paper. No one dealing in commercial paper would be willing to accept it afterward with such an indorsement standing thereon."

possessed by the transferrer can take away from the writing the character of an indorsement.[1]

§ 266. **Indorsements in full, and in blank.** — When an instrument is made payable by indorsement to a particular person or to his order, it is called an indorsement in full, and no one can demand payment but the person whose name appears in the indorsement, unless he also indorses it in full or in blank.[2] The negotiability of a paper, payable to A. or order, is not affected by an indorsement to B., without words of negotiability. B. may nevertheless transfer it by indorsement.[3]

Where the payee or indorsee merely writes his own name on the back of the instrument, it is called an indorsement in blank; and as long as it remains a blank indorsement, the instrument is transferable by delivery, and payable to bearer.[4] But the *bona fide* holder of an instrument indorsed in blank can by filling up the blank indorsement with a direction to pay to his own, or another's order, make it an indorsement in full.[5] But the holder cannot enlarge the liability of the indorser in blank, by writing over

[1] 1 Daniel's Negot. Inst., § 688*c*; Sears *v.* Lantz, 47 Iowa, 658. See Adams *v.* Blethea, 66 Me. 19.

[2] Lawrence *v.* Fassell, 77 Pa. St. 460; Reamer *v.* Bell, 79 Pa. St. 292; and no one else can indorse the paper, Mead *v.* Young, 4 T. R. 28.

[3] Potter *v.* Tyler, 2 Met. 58; Leavitt *v.* Putnam, 3 Comst. 494; Moore *v.* Manning, 1 Comyns, 311; Blackman *v.* Green, 24 Vt. 18; Lea *v.* Branch Bank, 8 Port. (Ala.) 119; Scull *v.* Edwards, 8 Eng. (Ark.) 24; Muldrow *v.* Caldwell, 7 Mo. 563.

[4] See Peacock *v.* Rhodes, 2 Doug. 633; Gaar *v.* Louisville B. Co., 11 Bush, 180; Palmer *v.* Nassau Bank, 78 Ill. 380; Morris *v.* Preston, 93 Ill. 215; Carter *v.* Sprague, 51 Cal. 239.

[5] Evans *v.* Gee, 11 Pet. 80; Tenney *v.* Prince, 4 Pick. 385; Central Bank *v.* Davis, 19 Pick. 376; Riker *v.* Cosby, 2 Penn. 911; Condon *v.* Pearce, 43 Md. 83; Rees *v.* Conococheague Bank, 5 Rand. 329; Johnson *v.* Mitchell, 50 Tex. 212; Andrews *v.* Simms, 33 Ark. 771; Hunter *v.* Hempstead, 1 Mo. 67; Hance *v.* Miller, 21 Ill. 636.

his signature a waiver of demand and notice, or of any other right.[1]

Where there are several successive indorsements in blank, the holder may fill up any one of them with an order for payment to himself, and thus claim title through that particular indorsement. Or he may fill them all up, showing regular indorsements in full from the payee to himself.[2] And where the holder fills up only one of the blank indorsements, he may release the other indorsers in blank by striking out their indorsements.[3] But the subsequent indorsers in blank are not discharged from liability merely because the holder fills up an earlier blank indorsement. The holder may still sue them as indorsers, notwithstanding he claims title through a prior indorser.[4] But it is possible, then, that these subsequent indorsements will fall under the head of irregular indorsements.[5]

In filling up a blank indorsement, the holder cannot increase the burden of the parties liable on the instrument, by making it payable in part to one person, and in part to another.[6]

If a bill be once indorsed in blank, subsequent indorsements in full will not prevent the bill or note from being payable to bearer, as long as the blank indorsement is not

[1] 2 Parsons' N. & B. 20; Central Bank *v.* Davis, 19 Pick. 376; Edwards on Bills, 273; 1 Daniel's Negot. Inst., § 694.

[2] Emerson *v.* Cutts, 12 Mass. 7, 8; Cole *v.* Cushing, 8 Pick. 48; Ellsworth *v.* Brewer, 11 Pick. 316; Craig *v.* Brown, Pet. C. C. 171; Ritchie *v.* Moore, 5 Munf. 388.

[3] Ritchie *v.* Munford, 5 Munford, 388. But if the holder strikes out an intermediate indorsement in blank, he releases all the subsequent indorsers, as he has deprived them of their recourse against the indorser, whose indorsement has been stricken out. Curry *v.* Bank of Mobile, 8 Port. (Ala.) 360.

[4] Cole *v.* Cushing, 8 Pick. 48; Bank of British N. A. *v.* Ellis, 9 Fed. Rep. 46. See 2 Parsons' N. & B. 19, note.

[5] See *post*, §§ 270, 271.

[6] Erwin *v.* Lynn, 16 Ohio St. 547. See *ante*, § 258.

filled up; at least as against the original parties to the instrument, and indorsers prior to the blank indorsement. But as against the subsequent special indorsers, the title must be traced through their indorsees.[1] While indorsements in blank may be filled up by the holder and thus made indorsements in full, an indorsement cannot be changed to an indorsement in blank by striking out the name of the indorsee and the other words of indorsement.[2]

§ 267. **Absolute and conditional indorsements.** — The absolute indorsement creates in the indorsee the right to payment, and in the indorser the obligation to pay the face of the instrument in case the maker, drawer or acceptor does not pay it, subject to the single condition that there must be a presentment for payment and a notice to him of non-payment. But the indorsement may be subjected to other conditions, both precedent and subsequent, without affecting the negotiability of the instrument.[3] If the condition is broken or unfulfilled, the indorsee is not entitled to payment, and if the acceptor or maker should make payment to such an indorsee before the performance of the condition, it would not preclude a recovery against him by the prior indorsee. For the maker and acceptor are obliged to take notice of the character of the indorsee.[4]

[1] Smith *v.* Clarke, Peake, 225; Walker *v.* McDonald, 2 Exch. 527; Habersham *v.* Lehman, 63 Ga. 383; Johnson *v.* Mitchell, 50 Tex. 212.

[2] Porter *v.* Cushman, 19 Ill. 572. The striking out of the name of an indorsee would be such an alteration of the contract of the indorser, as to release the indorser from all liability on his indorsement. Grimes *v.* Piersol, 25 Ind. 246.

[3] 1 Daniel's Negot. Inst., § 697; Story on Bills, § 217; Story on Notes, § 149.

[4] Robertson *v.* Kensington, 4 Taunt. 30; Savage *v.* Aldren, 2 Stark. (2 E. C. L. R.) 232; Soares *v.* Clyn, 8 Q. B. (35 E. C. L. R.) 24; *s. c.* 14 L. J. Q. B. 313.

§ 268. **Restrictive indorsements.** — When the further negotiation of the bill or note is destroyed by a provision in the indorsement, it is called a restrictive indorsement. Such is the case when the indorsement directs payment to A. only, or to A. for the use of the indorser or of another, and the like.[1] Another very common restrictive indorsement is the indorsement "for collection."[2] But the negotiability of a paper is not destroyed by an agreement not to sell or dispose of the paper, although the agreement may be indorsed on the back. Such an agreement only subjects the promisor to an action for damages for the breach of the contract.[3] In all cases of restrictive indorsement, the indorsee cannot indorse it to another, and is only authorized to collect the money when the bill or note is due, and apply the money so collected for the use of his indorser, or of the

[1] Edie *v.* East India Co., 2 Burr. 1221; Robertson *v.* Kensington, 4 Taunt. 30; Snee *v.* Prescott, 1 Atk. 247; Ancher *v.* Bank of England, Dougl. 615; Sigourney *v.* Lloyd, 8 B. & C. 622; Wilson *v.* Holmes, 5 Mass. 543; Brown *v.* Jackson, 1 Wash. C. C. 512; Power *v.* Finnie, 4 Call, 411; Hook *v.* Pratt, 78 N. Y. 371; Williams *v.* Potter, 72 Ind. 354; Harrison *v.* Sheirburn, 36 Tex. 73; Johnson *v.* Mitchell, 50 Tex. 212. Of the same character are the indorsements, "credit my account," and "pay to the order of A., for account of B." Lee *v.* Chillicothe Bank, 1 Bond, 387; First N. B. *v.* Reno County, 3 Fed. Rep. 257; White *v.* National Bank, 102 U. S. 658; Blaine *v.* Bourne, 11 R. I. 1; Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200; Treuttel *v.* Barandon, 8 Taunt. 100; 5 Moore, 543. But it does not make an indorsement restrictive to contain the words, "pay to A. or order, value in account with B.," "or being part payment of goods sold him by me," or "being in full of debt due to him by me," since these words constitute merely an acknowledgment of the consideration for the indorsement. Buckley *v.* Jackson, L. R. 3 Exch. 135; Potts *v.* Reed, 6 Esp. 57.

[2] Fawsett *v.* Nat. Life Ins. Co., 97 Ill. 19; Mechanics' Bank *v.* Valley, Packing Co., 4 Mo. App. 200; *s. c.* 70 Mo. 643; Sweeney *v.* Easter, 1 Wall. 166; Rock Co. Nat. Bank *v.* Hollister, 21 Minn. 385.

[3] Leland *v.* Parriott, 35 Iowa, 454, Cole, J., saying: "The agreement not to sell or dispose of the note was then an independent agreement upon breach of which, if made for a consideration, the obligor might be liable: but it could not have the effect to destroy the negotiability of the note."

person, for whose use the indorsement had been made to him. The restriction, appearing on the back of the instrument, is notice to all subsequent holders of the trust, and such subsequent indorsee will take the paper subject to the trust.[1] And if payment be refused, the restrictive indorsee cannot bring the action on the paper. It must be brought in the name of the person for whose use the collection was made.[2] This, at least, is the case where the indorsement is made "for collection," or "for the account of" the indorser. Where the indorsement is "for collection" or "for my use," and the like, it may be recalled at the pleasure of the indorser,[3] and such an indorsement is implied by a subsequent absolute indorsement for value to another.[4] And where the restrictive indorsement is such that it cannot be recalled, the negotiability of the paper may be revived by a re-indorsement to the indorser, or by a second absolute indorsement by him to the restrictive indorsee.[5]

The presumption is always against an indorsement being restrictive; and it will be held to be absolute, unless it is clearly proven to be restrictive.[6]

§ 269. **Time and place of indorsement and transfer.**— Negotiable paper may be transferred by delivery or by indorsement, as the case may be, at any time after its exe-

[1] Sigourney *v.* Lloyd, 8 B. & C. (15 E. C. L. R.) 622; *s. c.* 5 Bing. 525; 3 Y. & J. 220; Hook *v.* Pratt, 78 N. Y. 371; Fawsett *v.* Nat. Life Ins. Co., 97 Ill. 9; Claflin *v.* Wilson, 51 Iowa, 15; Treuttel *v.* Barandon, 8 Taunt. 100; Blaine *v.* Bourne, 11 R. I. 1; First Nat. Bank *v.* Reno, 3 Fed. Rep. 257; Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200; *s. c.* 70 Mo. 643.

[2] Rock Co. Nat. Bank *v.* Hollister, 21 Minn. 385; White *v.* Nat. Bank, 102 U. S. 658; Third Nat. Bank *v.* Nat. Bank, 102 U. S. 663.

[3] 1 Daniel's Negot. Inst., § 699.

[4] Atkins *v.* Cobb, 56 Ga. 86.

[5] Fawsett *v.* Nat. Life Ins. Co., 97 Ill. 19; Holmes *v.* Hosper, 1 Bay, 160.

[6] Potts *v.* Read, 6 Esp. 57; Treuttel *v.* Barandon, 8 Taunt. 100.

cution, whether before it falls due or afterwards. The dishonor of a note or bill does not prevent any subsequent assignment or transfer, whatever collateral effect it may have upon the rights of the postdue indorsee.[1]

If the indorsement is not dated, the law presumes as usual that it was made before the paper fell due and became dishonored, and that the indorsee took it without notice of any defect of title or of any equitable defense.[2]

[1] Mitford *v.* Walcott, Ld. Raym. 575; Dehers *v.* Harriott, 1 Show. 163; Stein *v.* Yglesias, 3 Dowl. 252; Charles *v.* Mursden, 1 Taunt. 224; Graves *v.* Kay, 3 B. & Ad. 313; National Bank *v.* Texas, 20 Wall. 72; Britton *v.* Bishop, 11 Vt. 70; Leavitt *v.* Putnam, 3 Comst. 494; Baxter *v.* Little, 6 Metc. 7; Long *v.* Crawford, 18 Md. 320; McSherey *v.* Brooks, 46 Md. 118; Davis *v.* Miller, 14 Gratt. 1; Brown *v.* Hull, 33 Gratt. 28; Moyner *v.* Bigelow, 3 Mo. App. 592; Powers *v.* Neeson, 19 Mo. 190.

[2] New Orleans, etc., *v.* Montgomery, 95 U. S. 18, Swayne, J., saying: "It is not shown in the proofs when the notes were transferred * * * In the absence of such proof, the law presumes they were taken under due, in good faith, and without notice of any infirmity attaching to them." In Ranger *v.* Cary, 1 Met. 369, it is said: "A negotiable note, being offered in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defense that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue." See also Collins *v.* Gilbert, 94 U. S. 753; Good *v.* Martin, 95 U. S. 94; Burnham *v.* Wood, 8 N. H. 334; Noxon *v.* DeWolf, 10 Gray, 346; Frazer's Admr. *v.* Frazer, 13 Bush, 400; Rhode *v.* Alley, 27 Tex. 443; Johnson *v.* Josey, 34 Tex. 533; White *v.* Weaver, 41 Ill. 409; Depuy *v.* Schuyler, 45 Ill. 506; Cripps *v.* Davis, 12 M. & W. 165; Lewis *v.* Lady Parker, 4 Ad. & E. (31 E. C. L. R.) 838; Parkin *v.* Moon, 7 C. & P. (32 E. C. L. R.) 408; New Orleans Canal Co. *v.* Templeton, 20 La. Ann. 75; Webster *v.* Calden, 56 Me. 204; Snyder *v.* Oatman, 16 Ind. 265; Leland *v.* Farnham, 25 Vt. 553; Alexander *v.* Springfield, 2 Met. (Ky.) 534; Mobley *v.* Ryan, 14 Ill. 51; Stewart *v.* Smith, 28 Ill. 397; Smith *v.* Nevlin, 89 Ill. 193; Barrick *v.* Austin, 21 Barb. 241; Hendricks *v.* Judah, 1 Johns. 319; Pinkerton *v.* Bailey, 8 Wend. 600; McDowell *v.* Goldsmith, 6 Md. 319; Hopkins *v.* Kent, 17 Md. 387; Webster *v.* Lee, 5 Mass. 334; Mason *v.* Noonan, 7 Wis. 609; Smith *v.* Clopton, 4 Tex. 109; Watson *v.* Flannagan, 14 Tex. 354; But see *contra*, Ruddell *v.* Landers, 25 Tex. 238; Clendennin *v.* Southerland, 31 Ark. 20.

But this presumption as to the date of the indorsement is not a very strong one. There is nothing on the face of the instrument itself to support the presumption, and hence the slightest evidence to the effect that the indorsement was after maturity would overturn the presumption, that it was before maturity.[1]

A bill or note which had been reduced to a judgment in an action brought by the holder, cannot thereafter be assigned or indorsed, since the recovery of a judgment works a merger of the instrument of indebtedness on which the suit is brought.[2] But it is claimed that there may be an indorsement or assignment, during the pendency of the suit, but it must be before judgment.[3]

The indorsement is also presumed to have been made at the place where the paper was dated.[4]

These presumptions, as to the time and place of indorsement, are of course rebuttable by positive proof to the contrary. And when, for example, the time of the indorsement is proven to have been subsequent to the execution of the instrument, the laws, in force when the indorsement was actually made, will govern its interpretation and construction.[5]

§ 270. **Irregular indorsements — Joint makers, sureties, guarantors, indorsers.** — It has become, at least in this country, a very common custom for one to give his

[1] Snyder *v.* Riley, 6 Barr. 164; Hill *v.* Kraft, 29 Pa. St. 186; Hatch *v.* Calvert, 15 W. Va. 97. It has been held in Georgia that the indorsee of a note payable one day after date, is not presumed to have taken it before maturity; the shortness of the time between execution and maturity was held to indicate that the paper was not intended for circulation. Beall *v.* Leverett, 32 Ga. 104.

[2] Wooten *v.* Maullsby, 69 N. C. 462.

[3] See Daniel's Negot. Inst., § 1199; Ober *v.* Goodridge, 27 Gratt. 888.

[4] Maxwell *v.* Vansant, 56 Ill. 58.

[5] Brown *v.* Hull, 33 Gratt. 30.

guaranty to the payment of commercial paper by merely writing his name on the back of the paper. Since he has not been payee or indorsee, he cannot be properly called an indorser, if by indorsement we mean the transfer of the paper by the holder by writing his name on the back. If indorsement means merely a writing on the back of the paper, no account being taken of the purpose, then it may be permissible for a guarantor, writing his name on the back of a negotiable instrument, to be called an indorser. He is in fact a guarantor. He does not intend to do more than guarantee the payment of the paper. But the chief difficulty in the way of construing the obligation thus assumed as a guaranty is the fact, that the statute of frauds requires all guaranties to be in writing. The mere writing on the back the name of a person not otherwise connected with the instrument, without stating the obligation assumed, would not satisfy this requirement of the statute of frauds. If the facts should warrant the construction that he is a surety or joint-maker, the difficulty in respect to the statute of frauds would be avoided; but there would still be the objection to be met, that, as surety or joint-maker, the holder of the paper would not be obliged to give notice of a demand on the primary obligor, in order to hold the surety liable. That requirement of a notice of non-payment is a very important safeguard to the irregular indorser, and he customarily relies upon it. But the common-law merchant, independent of statute, does not recognize any one but an indorser having this right to notice.

In their attempt to avoid these several objections the courts have reached contrary conclusions. They are practically unanimous that one who appears on the face of the paper to be the lawful holder, cannot assume, by writing his name on the back, any other liability than that of indorser.[1]

[1] Finley *v.* Green, 85 Ill. 535; Snell *v.* Northside Mill Co., 89 Ill. 582;

And so, also, where the paper is payable to bearer in terms on the face, or becomes so by a blank indorsement, any one writing his name on the back sustains the liability of an indorser, unless by some accompanying statement he expressly indicates the intention to be bound in some other character than as indorser.[1] The indorsement of the payee in blank, preceding the irregular indorsement, does not conflict with the view that the second indorsement is an indorsement in fact. And this would, also, at least as to *bona fide* holders, be the case, where the indorsement by the payee comes first on the paper, although the irregular indorsement was made before the payee's indorsement. In all such cases, the irregular indorser, as to *bona fide* holders, assumes the liability of a second indorser.[2]

But where the signature of the irregular indorser precedes the indorsement of the payee, or where the regular indorsements are all special; if there is an unbroken line of indorsements to order, or the irregular indorsement precedes the regular indorsement in blank, the position of the signature is ambiguous, and in the absence of parol proof of the in-

Clapp *v.* Rice, 13 Gray, 403; Howe *v.* Merrill, 5 Cush. 80; Moies *v.* Bird, 11 Mass. 436; Vore *v.* Hurst, 13 Ind. 551; Dale *v.* Moffitt, 22 Ind. 114; Roberts *v.* Masters, 40 Ind. 463; Rickey *v.* Dameron, 48 Mo. 61; Coon *v.* Pruden, 25 Minn. 105.

[1] A case, where the paper has been indorsed by the payee, in blank, and afterwards by some third person, "does not fall within that anomalous class of cases where a third person, neither maker nor payee, puts his name on the back of a note before its indorsement by the payee, but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied or controlled by parol proof." Bigelow *v.* Cotton, 13 Gray, 309; Dubois *v.* Mason, 127 Mass. 37; Thatcher *v.* Stevens, 48 Conn. 561; Camden *v.* McKoy, 3 Scam. 437. See Seabury *v.* Hungerford, 2 Hill, 80, where the party indorsing styled himself "backer."

[2] Clapp *v.* Rice, 13 Gray, 403; Dubois *v.* Mason, 127 Mass. 37. The same result is reached, where the name of the party signing on the back is inserted as payee. Armstrong *v.* Harshman, 61 Ind. 52; Morris *v.* Walker, 69 Eng. C. L. R. 588; Frank *v.* Lilienfeld, 33 Gratt. 393.

tention of the party signing, its meaning is open to conjectures and presumptions. The courts generally presume that a name, coming before the name of the payee in a paper payable to order, was placed there before the indorsement by the payee, and for the purpose of giving his financial credit to the holder of the paper.[1] The liability of a person, so signing on the back before the payee, is presumed to rest upon the same condition as the paper itself.[2] But in respect to the character in which such a person should be held liable on his indorsement, the courts are completely at variance. Very many, perhaps a plurality of the cases, maintain that he is *prima facie* liable as a joint maker.[3] Other cases, while holding him to be a co-maker, impose upon him the liability of a surety or guarantor.[4]

[1] Union Bank *v.* Willis, 8 Met. 504; Way *v.* Butterworth, 108 Mass. 508; Western Boatmen's Assn. *v.* Wolff, 45 Mo. 104; Cecil *v.* Mix, 6 Ind. 478; Mariewthal *v.* Taylor, 2 Minn. 147.

[2] Good *v.* Martin, 95 U. S. 90; Austin *v.* Boyd, 24 Pick. 64.

[3] Rey *v.* Simpson, 22 How. 241; Good *v.* Martin, 95 U. S. 95; Mammon *v.* Hartman, 51 Mo. 169; Seymour *v.* Farrell, 51 Mo. 95; Cohn *v.* Dulton, 60 Mo. 297; Temple *v.* Turner, 65 Mo. 696; Schneider *v.* Schiffman, 20 Mo. 571; Union Bank *v.* Willis, 6 Met. 504; Hawkes *v.* Phillips, 7 Gray, 284; Draper *v.* Weld, 13 Gray, 580; Woods *v.* Woods, 127 Mass. 141; Spaulding *v.* Putnam, 128 Mass. 363; Woodman *v.* Boothy, 66 Me. 389; Watson *v.* Hurt, 6 Gratt. 633; Orrick *v.* Colston, 7 Gratt. 189; Gilpin *v.* Marley, 4 Houst. 284; Com. *v.* Powell, 11 Gratt. 828; Houghton *v.* Ely, 26 Wis. 181; Rotschild *v.* Grix, 31 Mich. 150; Best *v.* Hoppie, 3 Col. 139; City Nat. Bk. *v.* Goddrich, 3 Col. 137; Perkins *v.* Barstow, 9 R. I. 507; Childs *v.* Wyman, 44 Me. 433; Carpenter *v.* Oaks, 10 Rich. 17; Martin *v.* Boyd, 11 N. H. 385; Weatherwax *v.* Paine, 2 Mich. 555; Herbage *v.* McEntee, 40 Mich. 337; Sibley *v.* Muskegan N. B., 41 Mich. 196; Moynahan *v.* Hanford, 42 Mich. 330; Baker *v.* Robinson, 63 N. C. 191; Sylvester *v.* Downey, 20 Vt. 355; McComb *v.* Thompson, 2 Minn. 139; Peckham *v.* Gilman, 7 Minn. 449; Robinson *v.* Bartlett, 11 Minn. 410; Ives *v.* Bosley, 35 Md. 262; Schley *v.* Merritt, 37 Md. 352; Walz *v.* Alback, 37 Md. 404; Norris *v.* Despard, 38 Md. 491; Third Nat. Bank *v.* Lange, 51 Md. 138; Owings *v.* Baker, 54 Md. 82; Barr *v.* Mitchell, 7 Oreg. 346; McGee *v.* Connor, 1 Utah, 92.

[4] Cook *v.* Southwick, 9 Tex. 615; Carr *v.* Rowland, 14 Tex. 275; Chandler *v.* Westfall, 30 Tex. 477; Killian *v.* Ashley, 24 Ark. 212; Mc-

Inasmuch as the theory that the irregular indorser is a joint maker is in contradiction of what is known to be the fact in many of the cases, many of the courts presume that the party writing his name on the back does not participate in the original consideration and that he must be secondarily liable as a guarantor, instead of being a joint maker.[1] The principal objection to the theory of a guaranty is that the statute of frauds requires guaranties to be in writing. In many of the States, it is held that the statute of frauds does not apply to such obligations,[2] while in other States,

Guire *v.* Bosworth, 1 La. Ann. 248; Chorm *v.* Merrill, 9 La. Ann. 533; Syme *v.* Brown, 79 La. Ann. 147. The authorities generally hold him to be a maker as to the holder of the paper, but a surety as to the regular maker. Good *v.* Martin, 95 U. S. 90; Hoffman *v.* Moore, 82 N. C. 313; Killian *v.* Ashley, 24 Ark. 511.

[1] Camden *v.* McCoy, 3 Scam. 437; Cushman *v.* Dement, 4 Scam. 497, Carroll *v.* Weld, 13 Ill. 482; Klein *v.* Currier, 14 Ill. 237; Webster *v.* Cobb, 17 Ill. 459; Dietrich *v.* Mitchell, 43 Ill. 46; Parkhurst *v.* Vail, 73 Ill. 343; Glickauf *v.* Kaufman, 73 Ill. 378; White *v.* Weaver, 41 Ill. 409; Lincoln *v.* Hensey, 51 Ill. 437; Clark *v.* Merriam, 25 Conn. 576; Beckwith *v.* Angell, 6 Conn. 315; Ranson *v.* Sherwood, 26 Conn. 437; Holbrook *v.* Camp. 38 Conn. 23; Gillespie *v.* Wheeler, 46 Conn 410; Bradley *v.* Phelps, 2 Root, 325; Fuller *v.* Scott, 8 Kan. 32; Seymour *v.* Mickey, 15 Ohio St. 515; Robinson *v.* Abell, 17 Ohio St. 36; Van Doren *v.* Tjader, 1 Nev. 380. In California, he is deemed to be a guarantor, but he is required to be given notice of non-payment. Pierce *v.* Kennedy, 5 Cal. 138; Geiger *v.* Clark, 13 Cal. 579; Riggs *v* Waldo, 2 Cal. 485; Ford *v.* Henderson, 34 Cal. 673; Crooks *v.* Tully, 50 Cal. 673; Jones *v.* Goodwin, 39 Cal. 493. Statutes now provide that such a person must be treated as a guarantor, unless his character is otherwise expressed, in Iowa (1880, 1 McClain's Ann. Stat. 586, § 2089), Illinois (1883, R. S., ch. 98, § 8).

[2] Chaddock *v.* Vanness, 6 Vroom, 517, Depue, J., saying: "When the party indorses upon the note a guaranty in writing, or his undertaking is subsequent to the making of the note and therefore requires a new consideration for its support, it may be difficult to exclude the agreement from the operation of the statute of frauds. But no such difficulty will be experienced, when the indorsement is in blank and is made prior to or contemporaneous with the delivery of the note. If a defendant puts his name upon the back of a promissory note as a surety or guaranty for its payment, in pursuance of an original agreement entered into before or at

it is held that the statute applies in all its strictness, and requires a full statement of the obligation and of the consideration.[1] But, in those States where the holder is held to have the authority to write out a full and complete guaranty over the signature of the guarantor,[2] the guaranty becomes effectual whenever it is written in full.

If the guaranty indorsement is contemporaneous with the original obligation, the original consideration, such as a loan to the principal debtor, will serve for both.[3] But if the guaranty is given subsequently, a new consideration must be proven.[4]

§ 271. **Irregular indorsements — Continued.** — But in order to avoid all the objections that may be urged against the theories heretofore presented, some of the courts, including Pennsylvania and New York, hold that a person, undertaking to guarantee the payment of a negotiable instrument by writing his name on the back, is liable as an

the time of giving the note, in consideration of which the payee agrees to accept it, the payee may write over such signature a guaranty or promise to pay, which shall be a sufficient memorandum within the statute of frauds." See also King *v.* Ritchie 18 Wis. 582; Houghton *v.* Ely, 26 Wis. 181. The same conclusion is reached in a case, where the indorsement was made some days after the execution of note. Ford *v.* Hendricks, 34 Cal. 673.

[1] Smith *v.* Kessler, 44 Pa. St. 142; Van Doren *v.* Tjader, 1 Nev. 380.

[2] Such is the case in Illinois, New Jersey, Kentucky and other States, See Boynton *v.* Pierce, 79 Ill. 145; Cushman *v.* Dement, 4 Ill. 497; Webster *v.* Cobb, 17 Ill. 459; Heinz *v.* Cahn, 29 Ill. 308; Chaddock *v.* Vanness, 6 Vroom, 517; Arnold *v.* Bryant, 8 Bush, 668; Rivers *v.* Thomas, 1 Lea. 649; Harding *v.* Waters, 6 Lea, 324; Levi *v.* Mendell, 1 Duv. 77; Nelson *v.* Dubois, 13 Johns. 175; White *v.* Weaver, 41 Ill. 409.

[3] Carroll *v.* Weld, 13 Ill. 682; Kracht *v.* Obst., 14 Bush, 34; Klein *v.* Carrier, 14 Ill. 237; Heinz *v.* Cahn, 29 Ill. 308; Kiskadden *v.* Allen, 7 Col. 206; Riggs *v.* Waldo, 2 Cal. 485; Veach *v.* Thompson. 15 Iowa, 380; Schwarzansky *v.* Averill, 7 Daly, 254; Parkhurst *v.* Vail, 73 Ill. 343.

[4] Tenney *v.* Prince, 4 Pick. 385. In New York, by statute, the new consideration must be expressed in the guaranty. Hall *v.* Farmer, 5 Denio, 484; affirmed, 2 N. Y. 553

indorser. He is generally held to be a second indorser, since the payee may make the signature of the guarantor appear to be a second indorsement, by indorsing the paper to the guarantor's order.[1] But of late it has been held in

[1] In Hall *v.* Newcomb, 7 Hill, 416, the court said: "The question for our consideration is, whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in a form that he may be charged as indorser, in the usual mode, if a demand is made and notice given of non-payment, can be charged as a general surety, without such demand and notice, by parol evidence merely. The courts have gone far enough in repealing the statute to prevent frauds and perjuries by introducing parol evidence to charge a mere surety for the principal debtor, by showing that his written agreement means something else than what, upon its face, it purports to mean. And I fully concur in the opinion expressed by Mr. Justice Bronson, in Seabury *v.* Hungerford, 2 Hill, 80, that where a man writes his name in blank upon the back of a negotiable promissory note, he only agrees that he will pay the note to the holder, on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he indorsed the paper, to enable the maker to raise money on it, does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. Such was the whole effect of the parol proof in this case. And for the courts to allow proof by parol to charge a mere surety, beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the statute of frauds." * * * Where a note is made payable to an individual or his order, and is indorsed by him in blank, and in that situation is presented to another person for his accommodation indorsement, who indorses it accordingly, the legal effect of his indorsement is to make him liable in the character of second indorser merely; and he can, in no event, be made legally liable to the first indorser. And if the maker, or the first indorser, or any other person into whose hands the note might subsequently come, should without the consent of the second indorser, fill up the first indorsement specially, without recourse, to such first indorser, so as to deprive the second indorser of his remedy over, in case he should be compelled to pay the note, it would be a gross fraud upon him, if not a forgery. But when such a note is presented to the accommodation indorser, and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable, the latter may, at the time he put his indorsement upon it, indorse it specially, without recourse, to himself, so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any

New York that when one, otherwise a stranger to a negotiable instrument, indorses it before the payee, for the purpose of guaranteeing the payment to the payee and his assigns, proof of that fact will render him liable as the first indorser, and the payee who becomes the second indorser, may have his remedy against the accommodation indorser.[1]

remedy over against the first indorser; or, if the object of the second indorser was to enable the drawer, as in this case, to obtain money from the payee of the note, upon the credit of such accommodation indorser, he may indorse it in the same way, without recourse, and by such indorsement may either make it payable to the second indorser or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser. Or he may recover on the common money counts, under the statute, by serving a copy of the note and of the indorsements so made thereon, with his declaration. But as the second indorser, if he has not waived notice of the demand of, and non-payment by the maker, cannot be made liable upon his indorsement, without proof of such demand and notice, the plaintiff, at the trial, must prove the same or he cannot recover." See also Eilbert *v.* Finkbeiner, 68 Pa. St. 247, Sharswood, J., saying: "Nobody ever doubted that when a man puts his name on the back of a negotiable paper before the payee has indorsed it, he means to pledge, in some shape, his responsibility for the payment of it. Kyner *v.* Shower, 1 Har. 446. This count finally settled, that in the absence of legal evidence of any different contract, he assumes the position of a second indorser, and that to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with, so as to give him recourse against the payee. Shafer *v.* The Farmers' & Mechanics' Bank, 9 P. F. Smith, 144." See also, to the same effect, Cottrell *v.* Conklin, 4 Duer, 45; Spies *v.* Gilmore, 1 Comst. 321; Phelps *v.* Vischer, 50 N. Y. 69; Woodruff *v.* Leonard, 8 N. Y. S. C. (1 Hun), 632; Heath *v.* Vancott, 9 Wis. 516; Cady *v.* Shepard, 12 Wis. 639; King *v.* Ritchie, 18 Wis. 554; Wells *v.* Jackson, 6 Blackf. 40; Earle *v.* Foster, 7 Blackf. 35; Roberts *v.* Masters, 40 Ind. 460; Bronson *v.* Alexander, 43 Ind. 244; Drake *v.* Markle, 21 Ind. 433; Dale *v.* Moffit, 22 Ind. 113; Mirre *v.* Chittenden, 56 Ind. 465; Browning *v.* Merritt, 61 Ind. 225; Rivers *v.* Thomas, 1 Lea, 649; Brinkley *v.* Boyd, 9 Heisk. 149; Needham *v.* Paige, 3 B. Mon. 465; Kellogg *v.* Dunn, 1 Met. (Ky.) 215; Thomas *v.* Jennings, 13 Miss. 627; Jennings *v.* Thomas, 21 Miss. 617.

[1] Moore *v.* Cross, 19 N. Y. 227; Coulter *v.* Richmond, 59 N. Y. 479,

The contrariety of opinion thus displayed, is but the necessary, albeit a somewhat unusual, result of an effort of the courts to legislate under the fictitious pretense of only declaring what the law is. There cannot be any doubt that the average person who signs his name on the back of a negotiable instrument, without having been the holder of the paper, knows and intends that he will thereby assume the liability of a guarantor, and that he will pay the sum due, after receiving prompt notice of the demand on the primary debtor and his refusal to pay. In other words, this guarantor desires and expects the protection afforded to the indorser by the rule of the law merchant, which requires the holder of a negotiable instrument to notify all indorsers promptly of the dishonor of the instrument by the primary debtor, in order to hold the indorsers liable. That, however, is the privilege of indorsers only; and in order to carry out the implied intent of the party signing, many of the courts have held him to be an indorser. It is undoubtedly proper that he should be given this notice. But he cannot be called an indorser, for he is in fact not one. If there has been an indorsement in blank by the payee or by

Church, C. J., saying: "In this State it has been repeatedly held, and is too strongly settled by authority to be disturbed, that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that on the face of the paper without explanation he is to be regarded as second indorser, and of course not liable upon the note to the payee, who is supposed to be the first indorser. As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee. Such, among others, was the case of Moore *v.* Cross, 19 N. Y. 227, where the indorsement was made to enable the maker to purchase coal of the payee; and it was held that the person making it was liable as first indorser, and that the payee could maintain an action against him upon the note, or if the payee transferred it, he might indorse it without recourse." See also Jaffray *v.* Brown, 74 N. Y. 394; Phelps *v.* Vischer, 50 N. Y. 71. See Milton *v.* De Yampert, 3 Ala. 648; Price *v.* Lavender, 38 Ala. 389; Hooks *v.* Anderson, 58 Ala. 238.

the last indorsee to order, the party so signing might plausibly be presumed to be a holder who indorses in blank. For he could easily be made in form an indorser, by having an indorsement written over some other signature in his favor. But where there is an unbroken line of special indorsements from the payee to the holder, there is no room whatever for the presumption that one, not an indorsee, who writes his name on the back, is an indorser.

If the irregular indorsement precedes the indorsement by the payee, the presumption is reasonable that it was made before the negotiation of the paper, and is based upon the original consideration moving from the payee. That presumption legitimately leads to the second presumption that this person signed as joint maker, in the character of a surety. But if the irregular indorsement follows the payee's indorsement, it seems to me the only reasonable presumption is that he signed as a guarantor.

In order to remedy this confusion and contradiction of authorities, statutes have been passed in many of the States establishing statutory presumptions in the place of these judicial presumptions, or giving such parties the protection afforded by the general law merchant to indorsers of negotiable paper. Thus in Massachusetts, it is now provided,[1] that "all persons becoming parties to promissory notes by a signature in blank on the back thereof shall be entitled to notice of non-payment the same as an indorser."[2]

[1] Mass. Gen. Stat. 1874, ch. 404; Commercial Bank *v.* Law, 127 Mass. 72.

[2] He is declared to be liable as an indorser in Connecticut (1884, Pub. Acts, p. 365); California (1880, 1 Hitt. Codes, §§ 8108, 8117), and Dakota (1877, Rev. Codes, 472, § 1845). In Iowa (1880, 1 McClain Ann. Stat. 586, § 2089), and Illinois (1883, R. S., ch. 98, § 8) he is declared to be a guarantor. In Georgia (Collins *v.* Everett, 4 Ga. 266), he is made by statute a surety as to all persons; and in North Carolina (Batt. Rev., ch. 10, § 10) as to the holders of all kinds of commercial paper, except foreign and inland bills of exchange.

§ 272. **Admissibility of parol evidence in respect to irregular indorsements.** — But whatever difficulty the courts have in determining what is the proper presumption in respect to irregular indorsement, they are practically unanimous in holding that, as between the immediate parties, it is competent to show by parol evidence in what character the irregular indorser intended that he should be bound, and proof of this intention would countervail the *prima facie* presumption set up by the court.[1] Thus it has been permitted to show that such a person intended to be bound as a guarantor;[2] as a maker;[3] as a surety or joint maker;[4] as an indorser, first or second.[5]

Parol evidence is held to be admissible, even where the indorsement was written below the signature of the payee.[6]

[1] Good *v.* Martin, 95 U. S. 95; Rey *v.* Simpson, 22 How. 241; Chaddock *v.* Vanness, 35 N. J. L. 571; Riley *v.* Gerrish, 9 Cush. 104; Johnson *v.* Ramsey, 14 Vroom, 279; Sylvester *v.* Downer, 20 Vt. 355; Quin *v.* Sterne, 26 Ga. 224; Watkins *v.* Kirkpatrick, 2 Dutch. 84; Ackerman *v.* Westervelt, 2 Dutch. 92*n;* Ives *v.* Bosley, 35 Md. 562; Owings *v.* Baker, 54 Md. 82; Brown *v.* Reasner, 5 Bradw. 45; Cahn *v.* Dutton, 60 Mo. 297; Nurre *v.* Chittenden, 56 Ind. 465; Baker *v.* Scott, 5 Rich. 305; Falkner *v.* Falkner, 60 Mo. 327; Comparree *v.* Brockway, 11 Humph. 358; Perkins *v.* Catlin, 11 Conn. 213; Pierse *v.* Irvine, 1 Minn. 369; Jennings *v.* Thomas, 13 Smed. & M. 617; Strong *v.* Ricker, 16 Vt. 554; Cooley *v.* Lawrence, 4 Mart. (o. s.) 639; Iser *v.* Cohen, 57 Tenn. 421; Taylor *v.* French, 2 Lea, 560; Welsh *v* Ebersole, 15 W Va 651.

[2] Camden *v.* McCoy, 3 Scam. 437; Worden *v.* Salter, 90 Ill. 160; Seymour *v.* Farrell, 51 Mo. 95; Taylor *v.* French, 2 Lea, 560; Barrows *v.* Lane, 5 Vt. 161; Levi *v.* Mendell, 1 Duv. 77; Browning *v.* Merritt, 61 Ind. 425; Eilbert *v.* Finkheiner 68 Pa. St. 243.

[3] Lincoln *v.* Hinzey, 51 Ill. 435.

[4] Rey *v.* Simpson, 22 How. 341; Walz *v.* Alback, 37 Md. 404; Kealing *v.* Vansickle, 74 Ind. 529; Baker *v.* Robinson, 63 N. C. 191.

[5] Mammon *v.* Hartman 51 Mo 169; Lewis *v.* Harvey, 18 Mo. 474; Western Boatmen's Assn. *v.* Wolf, 45 Mo. 104; Kuntz *v.* Tempel, 48 Mo. 71; Eberhart *v.* Page, 89 Ill. 550; Hamilton *v.* Johnston, 82 Ill. 39; Cady *v.* Shepard, 12 Wis. 713; Seymour *v.* Mackey, 15 Ohio St. 515; Beidman *v.* Gray, 35 Mo. 282; Patch *v.* Washburn, 16 Gray, 82; Kellogg *v.* Dunn, 2 Met. (Ky.) 215; Burton *v.* Hansford, 10 W. Va. 470.

[6] Brown *v.* Butler, 99 Mass. 179; Clawson *v.* Gustin, 2 South. 821.

And wherever parol evidence is admissible, it is competent to show by it that the party signed before the delivery of the paper to the payee, and that he intended to guarantee its payment to the payee.[1] It is also competent to show by parol evidence the character of the indorsement, whether it was made after maturity[2] or before the indorsement without recourse by the payee,[3] or whether the instrument was negotiable or not.[4]

The admissibility of parol evidence may be justified on the ground that the position of the signature on the back is ambiguous in itself, and the contract not being fully expressed in the mere signature, may be explained and proved by parol evidence. When the payee or indorsee writes his name across the back of the paper, there is no ambiguity, concerning the character and meaning of the signature, to be explained away. But if any one alone writes his name thereon, he only becomes a party to the instrument by his signature, and the position of the signature does not clearly indicate the character in which he signed. It can therefore be shown by parol evidence.[5]

Some of the authorities maintain that parol evidence is inadmissible to control the construction of an irregular indorsement as against *bona fide* purchasers for value; that such evidence is only admissible as between immediate par-

[1] Pearson *v.* Stoddard, 9 Gray, 199; Rivers *v.* Thomas, 1 B. J. Lea, 649; Clapp *v.* Rice, 13 Gray, 403; Cady *v.* Shepard, 13 Wis. 713; Baker *v.* Scott, 5 Rich. 305; Fegenbush *v.* Lang, 28 Pa. St. 193; Boynton *v.* Pierce, 79 Ill. 145; Sill *v.* Leslie, 16 Ind. 236; Kealing *v.* Vansickle, 74 Ind. 529; Sturtevant *v.* Randall, 53 Me. 149; Jennings *v.* Thomas, 13 Smed. & M. 617.

[2] McCelvy *v.* Noble, 12 Rich. 167.

[3] Watkins *v.* Kirkpatrick, 2 Dutch. 84.

[4] Wells *v.* Jackson, 6 Blackf. 40.

[5] 1 Daniel's Negot. Inst., § 711. But see Essex Company *v.* Edmunds, 12 Gray, 273; Kellogg *v.* Dunn, 2 Met. (Ky.) 215; Heath *v.* Van Cott, 9 Wis. 516; Peckham *v.* Gilman, 7 Minn. 446.

ties to the transaction.[1] But the better opinion is that, in every case where the signature on the back is in an ambiguous position, and the meaning can only be definitely ascertained by parol evidence, then parol evidence is admissible to prove its true character, even against a purchaser for value, for he can reasonably be charged with notice of this ambiguity.[2]

§ 273. Limitations upon admissibility of parol evidence in respect to irregular indorsements. — For the reason that parol evidence is admissible only to explain away the ambiguities of a written instrument, as soon as the ambiguity is disposed of or dissipated, parol evidence ceases to be admissible to control the terms and character of the contract. Thus it has been held that proof of the fact that the indorsement was made before the delivery of the paper to the payee, fixes the liability of the irregular indorser as that of joint maker, and parol evidence is inadmissible to show a different intention.[3] Other cases hold that the in-

[1] Houston *v.* Bruner, 39 Ind. 383; Browning *v.* Merritt, 61 Ind. 425; Schneider *v.* Schiffman, 20 Mo. 571. In Missouri it is also held to be admissible against an indorsee after maturity. Seymour *v.* Farrell, 51 Mo. 95.

[2] Greenough *v.* Smead, 3 Ohio St. 415; Thacher *v.* Stevens, 46 Conn. 561 (inferentially). See Rey *v.* Simpson, 22 How. 341; Good *v.* Martin, 95 U. S. 95; Cavazoo *v.* Trevino, 6 Wall 773; Frank *v.* Lilienfeld, 33 Gratt. 392; Denton *v.* Peters, 5 Q. B. L. R. 475.

[3] Way *v.* Butterworth, 108 Mass. 512, Ames, J., saying: "If A. F. Butterworth signed his name upon the back of the note at the time when it was made, or at any time before it was delivered as a valid and binding contract to Manuel, he must be considered as an original promisor, and parol evidence would not be admissible to show that such was not his real contract. Bank *v.* Willis, 4 Met. 504; Brown *v.* Butler, 99 Mass. 179. In favor of a *bona fide* holder, it is presumed that the promise of such an indorser was made at the same time with the note. This, however, is not a conclusive presumption. This defendant would have a right to show that the fact was otherwise, and that his contract was not made until after the note had taken effect as a binding contract; and if he should succeed in proving it to be so, he might either not be charge-

dorsement before the payee, only excludes the liability of an indorser, and it may be shown by parol evidence whether the party so signing intended to be bound as a joint promisor or as a guarantor.[1]

But if the name were signed subsequent to the indorsement of the payee, then the idea of the party signing being a joint maker is excluded, and parol evidence is admissible only to show whether the liability was intended to be that of an indorser or of a guarantor.[2] Finally, if the party, in

able as surety or guarantor, according to the facts proved. Wright *v.* Morse, 9 Gray, 337. If he placed his name in blank upon the back of the note after it was given, he could not be held as an original promisor. McCorney *v.* Stanley, 8 Cush. 85; Courtney *v.* Doyle, 10 Allen, 122." See also Good *v.* Martin, 95 U. S. 94; Essex Co. *v.* Edmunds, 12 Gray, 273; Bigelow *v.* Colton, 13 Gray, 309; Lake *v.* Stetson, 13 Gray, 310; Pearson v. Stoddard, 9 Gray, 199; Chaddock *v.* Vanness, 35 N. J. L. 518; Commonwealth *v.* Powell, 11 Gratt. 828; Good *v.* Martin, 1 Col. 165. But see Irish *v.* Cutler, 31 Me. 536; Hall *v.* Newcomb, 7 Hill, 416; Price *v.* Lavender, 33 Ala. 390; Schneider *v.* Schiffman, 20 Mo. 571.

[1] Greenough *v.* Smead, 3 Ohio St. 415; Quin *v.* Sterne, 26 Ga. 223; Mathewson *v.* Sprague, 1 R. I. 8; Perkins *v.* Barstow, 6 R. I. 595; Manuf. Bank *v.* Tollett, 11 R. I. 92; Carpenter *v.* McLaughlin, 12 R. I. 270; Brinkley *v.* Boyd, 9 Heisk. 149. But see *contra*, Price *v.* Lavender, 38 Ala. 390; Kamm *v.* Holland, 2 Oreg. 59; Clonston *v.* Barbiere, 4 Sneed, 338; Wells *v.* Jackson, 6 Blackf. 43; Dore *v.* Hurst, 13 Ind. 554; Sill *v.* Leslie, 16 Ind. 236; Dale *v.* Moffitt, 22 Ind. 114; Roberts *v.* Masters, 40 Ind. 462; Comparree *v.* Brockway, 11 Humph. 358; Jennings *v.* Thomas, 13 Smed. & M. 617. In these cases, such a person's liability is held to be *prima facie*, that of an indorser.

[2] Rey *v.* Simpson, 22 How. 241; Good *v.* Martin, 95 U. S. 95; Irish *v.* Cutter, 31 Me. 536; Benthall *v.* Judkins, 13 Met. 265. In Rey *v.* Simpson, *supra*, the court made the following full statement of their view of the whole subject: "When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place.

"I. If he put his name on the back of the note at the time it was made as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

"II. On the other hand, if his indorsement was subsequent to the

writing his name on the back of a commercial instrument, expressly designates the character of his signature, such as "indorser," "guarantor," and the like, parol evidence is inadmissible for any purpose, since the express description removes the ambiguity, and leaves nothing to explain.[1]

§ 274. **Admissibility of parol evidence in respect to indorsements in general.** — The common rule of evidence, that parol evidence is inadmissible to vary or contradict a written instrument of indebtedness or of conveyance, applies generally to indorsements, which are regular and unambiguous. It has been already shown[2] that ambiguous or irregular indorsements may be explained with the aid of parol evidence, and shown to be a surety, guaranty or indorsement, according to the established intention of the party signing. But if an indorsement is regular, *i.e.* it constitutes a link in the successive transfer of the paper from the payee to the present holder, parol evidence is not admissible to show that the party indorsing in this manner

making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor.

"III. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would be clearly entitled to the privileges which belong to such indorsers." See, also, in conformity with *par.* III of the preceding quotation, Kayser *v.* Hull, 85 Ill. 513; Blatchford *v.* Milliken, 35 Ill. 434. In Kentucky it has been held that proof of intention is confined to the question whether the party intended to assume the liability of an indorser or guarantor. Kellogg *v.* Dunn, 2 Met. (Ky.) 215.

[1] Tinker *v.* McCauley, 3 Mich. 188, overruling Higgins *v.* Watson, 1 Mich. 428; Whitehouse *v.* Hanson, 42 N. H. 9; Callaway *v.* Harold, 61 Ga. 111; Pinnes *v.* Ely, 4 McLean, 173. In Kamm *v.* Holland, 2 Oreg. 59, one signing "A. B. security" was held to be an indorser, and not a maker or guarantor.

[2] §§ 272, 273

intended to become bound as joint-maker, guarantor, or in any other character than as indorser.[1] Nor is it possible by parol evidence to vary or limit the liability of the indorser beyond what is expressed in the indorsement. Thus, it is not admissible to show by parol evidence that the indorser intended to make the indorsement "without recourse" as to him.[2] It is also incompetent to show by parol evidence that the liability on the indorsement was made conditional in any other way, or different from the ordinary liability of an indorser.[3] But while it is the general rule

[1] Howe *v.* Merrill, 5 Cush. 80; Hamburger *v.* Miller, 48 Md. 327; Fuller *v.* McDonald, 8 Greenl. 213; Dibble *v.* Duncan, 2 McLean, 353; Hauer *v.* Patterson, 84 Pa. St. 275; Barnard *v.* Guslin, 23 Minn. 194; Finley *v.* Green, 85 Ill. 536.

[2] Martin *v.* Cole, 104 U. S. 30; *s. c.* 3 Col. 113; Brown *v.* Spofford, 95 U. S. 483; Jones *v.* Albee, 70 Ill. 37; Skelton *v.* Dustin, 92 Ill. 49; Courtney *v.* Hogan, 93 Ill. 101; Rodney *v.* Wilson, 67 Mo. 123; Lewis *v.* Dunlap, 72 Mo. 178; Fuller *v.* McDonald, 8 Greenl. 213; Crocker *v.* Getchell, 23 Me. 392; Barry *v.* Morse, 3 N. H. 132; Charles *v.* Denis, 42 Wis. 56; Eaton *v.* McMahon, 42 Wis. 487; Dale *v.* Gear, 38 Conn. 15; *s. c.* 39 Conn. 89; Bank of U. S. *v.* Dunn, 6 Pet. 51; Wilson *v.* Black, 6 Blackf. 509; Skinner *v.* Church, 36 Iowa, 91; Am. Emigrant Co. *v.* Clark, 47 Iowa, 671; Campbell *v.* Robbins, 29 Ind. 271; Doolittle *v.* Ferry, 20 Kan. 230; Kern *v.* Von Phul, 7 Minn. 426; Woodward *v.* Foster, 18 Gratt. 205. As against a subsequent holder for value, it cannot be shown that the indorsee agreed to write the words "without recourse" over the indorser's signature. Lewis *v.* Dunlap, 72 Mo. 174. And in Indiana it has been held to be inadmissible, even as between the immediate parties, to show by parol evidence that the words "without recourse" were omitted by mistake. Lee *v.* Pile, 37 Ind. 107. But it is admissible to show a contemporaneous written agreement that the indorsement should be without recourse. Davis *v.* Brown, 94 U. S. 423. And if a note was intended to be indorsed "without recourse," and these words were omitted by mistake, but afterwards added by consent, it is proper to show by parol all these facts, and further that the words were subsequently stricken out. Beal *v.* Wood, 5 Mo. App. 591.

[3] That the signature was put on the paper, merely to identify the holder. Prescott Bank *v.* Caverly, 7 Gray, 217; Stack *v.* Beach, 74 Ind. 571. That the liability was to depend upon the sale of certain estates. Free *v.* Hawkins, 8 Taunt. 92; Holt, 550; 1 Moore, 535. See generally Johnson *v.* Ramsey, 14 Vroom, 279; Gist *v.* Drakeley, 2 Gill, 330; Sny-

that parol evidence is inadmissible to explain away or vary a commercial instrument, there are a few exceptions to the rule. The exceptions are, principally, of three classes. *First*, it is always competent to show by parol evidence that the indorsement was made without consideration, as, for example, that it was made for the accommodation of the indorsee.[1] *Secondly*, it may be shown that the indorsement was made in trust to the indorsee, for the purpose of carrying out some purpose of the indorser, as his agent, or as a trustee. Thus, for example, it can be shown that the indorsement was made "for collection" only,[2] as an escrow

der *v.* Oatman, 16 Ill. 265; Beattie *v.* Browne, 64 Ill. 360; Day *v.* Thompson, 65 Ala. 269; Bartlett *v.* Lee, 33 Ga. 491; Holton *v.* McCormick, 45 Ga. 411; Roberts *v.* Master, 40 Ga. 461; Preston *v.* Ellington, 74 Ala. 133; Doolittle *v.* Ferry, 20 Kan. 230; Barnard *v.* Goslin, 23 Minn. 192; Schnell *v.* Northside Mill Co., 89 Ill. 581; Skelton *v.* Dustin, 92 Ill. 49; Crocker *v.* Getchell, 23 Me. 392; Woodward *v.* Foster, 18 Gratt. 200; Charles *v.* Denis, 42 Wis. 56; Barry *v.* Morse, 3 N. H. 132.

[1] Breneman *v.* Furniss, 90 Pa. St. 186; Hamburger *v.* Miller, 48 Md. 325; Morris *v.* Faurot, 21 Ohio St. 155; Cole *v.* Smith, 29 La. Ann. 551; Davis *v.* Morgan, 64 N. C. 570; Lovejoy *v.* Citizens' Bank, 23 Kan. 331; Kirkham *v.* Boston, 67 Ill. 599; McCoon *v.* Biggs, 2 Hill, 121; Denniston *v.* Bacon, 10 Johns. 198; Foster *v.* Jolly, 1 C. M. & R. 703. Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. Smith *v.* Carter, 25 Wis. 283. So can partial failure or want of consideration be proved by parol evidence. Cook *v.* Cockrill, 1 Stew. (Ala.) 475. It can also be shown that the consideration was certain payments to be made by the indorsee, the liability on the indorsement being conditional upon making these payments. Scammon *v.* Adams, 11 Ill. 575; Wood *v.* Matthews, 73 Mo. 477.

[2] Lawrence *v.* Stonington Bank, 6 Conn. 521; Dale *v.* Gear, 38 Conn. 15; 39 Conn. 89; Lewis *v.* Dunlap, 72 Mo. 178; Smith *v.* Childress, 27 Ark. 328; Ricketts *v.* Pendleton, 14 Md. 320; Hamburger *v.* Miller, 48 Ind. 325; Hill *v.* Ely, 5 Serg. & R. 363; Manley *v.* Boycott, 2 El. & Bla. (75 E. C. L. R.) 46; Martin *v.* Cole, 3 Col. 114; Downer *v.* Cheesbrough, 36 Conn. 39. But see Chaddock *v.* Vanness, 6 Vroom, 521; Johnson *v.* Ramsey, 14 Vroom, 279. But it is not possible, on the other hand, to show by parol evidence that an indorsement, expressed to be "for collection," was intended to pass title. White *v.* Miners' Nat. Bank, 102 U. S. 658; Leary *v.* Blanchard, 48 Me. 268; First Nat. Bank *v.* McCann, 4 Bradw. 250; Armour Bkg. Co., *v.* Riley Co. Bank, 30 Kan. 163; Rock

upon an express condition not yet performed,[1] or to enable a transfer for any other special purpose.[2] In all these cases, there is in fact an absence of consideration, which alone would avoid the liability of an indorser. *Thirdly*, it may always be shown by parol evidence, that the indorsement was procured by fraud,[3] accident or mistake.

Whether parol evidence is admissible to prove an agreement to waive demand and notice of non-payment, has been decided both in the affirmative,[4] and in the negative.[5]

Co. Bank *v.* Hollister, 21 Minn. 385; Third Nat. Bank *v.* Clark, 23 Minn 263.

[1] Chaddock *v.* Vanness, 35 N. J. L. 520; Bell *v.* Lord Ingestre, 12 Q. B. (64 E. C. L. R.) 317; Goggerty *v.* Guthbert, 2 B. & P. N. R. 170; Wallis *v.* Little, 14 C. B. 369; Ricketts *v.* Pendleton, 14 Md. 320.

[2] Pollock *v.* Bradbury, 8 Moore P. C. 227; Bell *v.* Lord Ingestre, 12 Q. B. (64 E. C. L. R.) 317; Adams *v.* Jones, 12 Ad. & El. 455; Dale *v.* Gear, 38 Conn. 15; Hamburger *v.* Miller, 48 Md. 325; Scammon *v.* Adams, 11 Ill. 578; Chaddock *v.* Vanness, 35 N. J. L. 520; Menderhall *v.* Davis, 72 N. C. 150; Commissioners Iredell Co. *v.* Wasson, 82 N. C. 308; Girard Bank *v.* Comley, 2 Miles, 405; Patterson *v.* Todd, 18 Pa. St. 426; Patten *v.* Pearson, 57 Me. 428; Lynch *v.* Goldsmith, 64 Ga. 42; Hardy *v.* White, 60 Ga. 455. But see *contra*, Lee *v.* Pile, 37 Ind. 107; Dunn *v.* Ghost, 5 Col. 134. Parol evidence is not admissible to show this fact in a suit by a *bona fide* holder. Lewis *v.* Dunlap, 72 Mo. 174; Stapler *v.* Burns, 43 Ga. 382; Meador *v.* Dollar Sav. Bank, 56 Ga. 605.

[3] Kirkham *v.* Boston, 67 Ill. 599; Lewis *v.* Dunlap, 72 Mo. 178; Hamburger *v.* Miller, 48 Md. 325; Hill *v.* Ely, 5 Serg. & R. 363; Brenemann *v.* Furniss, 90 Pa. St. 186.

[4] Dye *v.* Scott, 35 Ohio St. 194; Fuller *v.* McDonald, 8 Greenl. 213; Lane *v.* Steward, 20 Me. 98; Boyd *v.* Cleveland, 4 Pick. 525; Hazard *v.* White, 26 Ark. 174; Taylor *v.* French, 2 Lea, 260; Barclay *v.* Weaver, 19 Pa. St. 396.

[5] Rodney *v.* Wilson, 67 Mo. 123; Beeler *v.* Frost, 70 Mo. 186; Kern *v.* Von Phul, 7 Minn. 74; Hightower *v.* Ivy, 2 Port. (Ala.) 308; Barry *v.* Morse, 3 N. H. 132; Bank of Albion *v.* Smith, 27 Barb. 489. In Davis *v.* Gowen, 19 Me. 449, it was held that there could be no waiver of demand by parol evidence.

CHAPTER XIV.

THE RIGHTS OF BONA FIDE HOLDERS.

SECTION 279. General statement.
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281. Cases of forgery.
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283. Blank instruments intrusted to another and wrongfully filled up.
284. Instruments written over blank signatures.
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302. *Lis pendens* — Garnishment and trustee process — Public records.
303. Burden of proof as to *bona fide* ownership.
304. The rights and powers of pledgees of commercial paper.
305. *Bona fide* holders of commercial paper secured by mortgage.

§ 279. **General statement.** — The peculiarity of the rights of the *bona fide* holder is what in the main distin-

guishes negotiable from non-negotiable instruments, and what makes the negotiable instrument so valuable an aid to exchange. This peculiarity consists in a protection of the *bona fide* holder against the ordinary defenses, which would prevent recovery on the instrument, if the action were brought by any one else. The general rule may be stated thus: A holder of negotiable paper, who has taken it (1) *bona fide*, (2) without notice of dishonor and of existing defenses, (3) for a valuable consideration, (4) in the usual course of business, (5) and before maturity, can recover on the paper, and is not subject to the defenses which do not appear on the face of the paper, which might be set up against the original payee, or a subsequent holder, not a *bona fide* holder.

§ 280. **What defenses will prevail against bona fide holders.** — It is usually stated that the *bona fide* holder takes the negotiable paper free from all equitable defenses, meaning thereby those defenses, which do not appear on the face of the paper, and which do not absolutely destroy the existence of the paper as a monetary obligation. For example, the *bona fide* holder can enforce a negotiable instrument, although it was obtained without consideration;[1] or on an illegal consideration, unless the instrument, based upon the illegal consideration, is expressly declared by statute to be void;[2] where the instrument was originally obtained through fraud, theft or robbery;[3] or

[1] See *ante*, § 154.

[2] See *ante*, § 178.

[3] See Hobart *v.* Penny, 70 Me. 248; Burrill *v.* Parsons, 71 Me. 282; Taylor *v.* Bowles, 28 La. 295; Ogden *v.* Marchand, 29 La. Ann. 61; Kinyon *v.* Wohlford, 17 Minn. 240; Goodman *v.* Simonds, 20 How. 343; Brown *v.* Spofford, 95 U. S. 481; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65; Central Bank *v.* Hammett, 50 N. Y. 159; Johnson *v.* Way, 27 Ohio St. 274; Franklin Sav. Bank *v.* Heusman, 1 Mo. App. 336; Selser *v.* Brock, 3 Ohio St. 302; Farmers', etc., Bank *v.* Lucas, 26 Ohio St. 385; Anderson

where it was subsequently released,[1] or paid before maturity.[2]

But there are some defenses, which can defeat recovery on a negotiable instrument by a *bona fide* holder, as well as by the original payee. They are, generally, of such a nature as to make the instrument absolutely void, instead of voidable. They will now be presented somewhat in detail.

If a statute pronounces a commercial instrument absolutely void, on account of the illegality of the consideration, the instrument is not even good in the hands of an innocent purchaser for value.[3] If the maker or other primary obligor of the instrument is incapacitated, on account of infancy, coverture, or insanity, from executing the instrument, it is void in the hands of a *bona fide* holder.[4] In this country all corporations, which can contract debts, are held to have the power to issue bills and notes in the ordinary course of its business;[5] and although the defense of *ultra vires* is good against the original payee, it cannot avail against a *bona fide* holder, unless the corporation,

v. Warne, 71 Ill. 20; Wayne, etc., Co. *v.* Cardwell, 73 Ind. 555; Robinson *v.* Reynolds, 2 Q. B. 196; Craig *v.* Sibbett, 15 Pa. St. 238; Thiedemann *v.* Goldschmidt, 1 De G. F. & J. 4; Smith *v.* Hiscock, 14 Me. 449; Sturges *v.* Miller, 80 Ill. 241.

[1] Schoer *v.* Houghlin, 50 Cal. 528; Palmer *v.* Marshall, 60 Ill. 289.

[2] Swall *v.* Clarke, 51 Cal. 227. If paid at maturity to the one then holding the paper, any subsequent holder or purchaser could not claim to be a *bona fide* holder. Gordon *v.* Wansey, 21 Cal. 77; Gardner *v.* Maynard, 7 Allen, 456.

[3] Ramsdell *v.* Morgan, 16 Wend. 574; Town of Eagle *v.* Kohn, 84 Ill. 292; Hatch *v.* Burroughs, 1 Woods, 439; Taylor *v.* Beck, 3 Rand. 316; Aurora *v.* West, 22 Ind. 88; Hall *v.* Wilson, 16 Barb. 548; Vallet *v.* Parker, 6 Wend. 615; Bayley *v.* Tabor, 5 Mass. 286. See also *ante*, § 178. But the *bona fide* holder is entitled to recover, if the statute does not declare the instrument void. Williams *v.* Cheny, 3 Gray, 215; Hubbard *v.* Chapin, 2 Allen, 328. See *ante*, § 178.

[4] See *ante*, chapter IV., on Persons Incapacitated to become Parties to Commercial Paper.

[5] See *ante*, § 115.

which executes the paper, is not authorized in any case to issue commercial paper.[1]

The other cases of defenses which avail against the *bona fide* holder, are those in which, under varying circumstances, the consent of the primary obligors to the negotiation of the instrument is wanting.

§ 281. **Cases of forgery.** — If the maker or drawer, or acceptor, has never executed the instrument, as when the signature or signatures are forged, or the instrument has been altered in some material part after signing, the original parties are not bound on the instrument in the hands of *bona fide* holder.[2] The reason for this is plain. The instrument is not the contract of the parties whose names appeared to be signed to it.

§ 282. **Instruments void for want of delivery by maker or drawer.** — Delivery of a negotiable instrument is essential in order to create any liability as between the immediate parties to the instrument.[3] But the authorities are not agreed, whether a *bona fide* holder can recover on an instrument that has been taken away from the maker without his consent; which in other words has never been delivered by him to any one for any purpose. Some of the cases hold that the maker or drawer is not liable in any such case, whether completed or uncompleted, unless it can be shown that possession of the undelivered instrument has been obtained through his culpable negligence.[4] But it has been

[1] See *ante*, § 116.

[2] See *post*, chapter on Fogeries and Alterations.

[3] See *ante*, §§ 34–34*d*.

[4] Burson *v.* Huntington, 21 Mich. 415; Hall *v.* Wilson, 16 Barb. 556, Allen, J., saying: "The note never had any inception so as to enable any person to become a *bona fide* holder of it. It was an imperfect instrument, wanting delivery to give it validity as the promissory note of the defendant. The holder has taken a blank piece of paper, not a

held to be negligence for one to sign and otherwise complete a negotiable instrument before the time appointed for delivery, and to lay it away in some drawer or box, although secured by key and bolt. If such an instrument, completed and requiring only delivery to the payee, is stolen, and finally passes into the hands of a *bona fide* holder,[1] it is held in these cases that the maker would be liable to the *bona fide* holder.[2]

But it is conceded, even by those who advocate the right of the *bona fide* holder to recover, where a completed negotiable instrument has been stolen and transferred to him in good faith, that the *bona fide* holder gets no title or claim against the maker, where the stolen instrument was incomplete, and was afterwards filled up.[3] The authorities

promissory note." This case was confirmed in Eastman *v.* Shaw, 65 N. Y. 522, by Dwight, C. But see *contra*, Gould *v.* Segee, 5 Duer, 270.

[1] If it is payable to order, it must be indorsed by the payee, in order to enable the purchaser to be a *bona fide* holder.

[2] Kinyon *v.* Wohlford, 17 Minn. 239; Shipley *v.* Carroll, 45 Ill. 285; Worcester Co. Bank *v.* Dorchester, etc., Bank, 10 Cush. 488; Salander *v.* Lockwood, 66 Ind. 285; Clarke *v.* Johnson, 54 Ill. 296. In the last case the note was signed and otherwise completed, except that he was about to insert a condition that it should not be valid, unless the plows, which constituted the consideration, were delivered. But before he could add this condition, the payee snatched it out of his hand, ran off, and sold the note to a *bona fide* holder. Mr. Parsons says: "If a person signs notes in blank, and locks them up in his safe, whence they are stolen, filled up and negotiated, without fault or negligence on his part, he is not liable. Possibly it might be held otherwise, if he make and sign a perfect note, payable to bearer, and it be stolen under similar circumstances; on the ground that, when the instrument is once perfected (although it has never passed out of the maker's hand and consequently has no inception as a contract) it is like money; and any one who receives it in good faith, and for a valuable consideration, acquires a perfect title." 1 Parsons' N. & B. 114.

[3] "The second class of cases arises when an incomplete instrument has been signed and stolen, without any delivery to an agent in trust, or otherwise, intervening. In such cases, no trust for any purpose has been created. No instrument has been perfected. No appearance of validity has been given it. No negligence can be imputed. Therefore,

are unanimous that the *bona fide* holder gets nothing by a transfer to him of an incomplete instrument, which has been stolen from the maker.[1] But I am satisfied that the position of the New York courts is correct in denying validity to all negotiable instruments, which have been stolen, without any fault on the part of the maker, whether they were complete or incomplete. This would seem to be the ruling of the English courts also.[2]

if the blank be filled, it is sheer forgery, in which the maker is in nowise involved, and he is not therefore bound, even to a *bona fide* holder without notice." 1 Daniel's Negot. Inst., § 841.

[1] Ledwick *v.* McKim, 53 N. Y. 315; Redlick *v.* Doll, 54 N. Y. 236. Unless the case of Clark *v.* Johnson, 54 Ill. 296, where a note was snatched out of the maker's hands, before he could insert a condition in respect to his liability on the note, be considered an exception to the general drift of the authorities.

[2] Bazendale *v.* Bennett, L. R. 3 Q. B. D. 527; *s. c.* 47 L. J. Q. B. 624; *s. c.* 26 W. R. 899; 33 Ann. Rep. 137; 40 L. T. R. 23, Bramwell, L. J., saying: "The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he has said or done or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it, not being a bill, was stolen from him, filled up without a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill. I am of the opinion that he could not; but what I wish to point out is, that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and

§ 283. **Blank instruments intrusted to another, and wrongfully filled up.** — If one should execute or sign commercial instruments in blank and deliver them to an agent to fill up the blanks in accordance with the specific directions; and this agent should fill them up for larger amounts or on different terms, the maker would be bound by these instruments as filled, if they should come into the hands of a *bona fide* holder, on the ground that having reposed confidence in the agent, and held him out to the world as worthy of confidence, he should bear the loss arising from the agent's breach of trust or violation of instructions, rather than a *bona fide* holder for value.[1] As it was ex-

without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? * * * But what about the authorities? It must be admitted the cases of Young *v.* Grote (4 Bing. 253), and Ingham *v.* Primrose, (7 C. B. (N. S.) 82; L. J. C. B. 294), go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent, that is to say, I think if he had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion."

[1] Violet *v.* Patton, 5 Cranch, 142; Michigan Bank *v.* Eldred, 9 Wall. 548; Redlich *v.* Doll, 54 N. Y. 236; Russell *v.* Langstaff, 2 Dougl. 514, Fullerton *v.* Sturgis, 4 Ohio St. 529; Orrick *v.* Colston, 7 Gratt. 189; Frank *v.* Lilienfeld, 33 Gratt. 285; Diercks *v.* Roberts, 13 S. C. 338; Powell *v.* Duff, 3 Camp. 182; Schultz *v.* Astley, 29 E. C. L. R. 414; Coburn *v.* Webb, 56 Ind. 96; Mahone *v.* Central Bank, 17 Ga. 111;

pressed by Lord Mansfield, "the indorsement (signature) on a blank note is a letter of credit for an indefinite sum."[1] The *bona fide* holder can recover, although the amount was increased beyond that agreed upon.[2] So, also, where the instrument was given for one purpose and perverted to another,[3] or was to be filled within a given time, and the time had expired,[4] or the date was filled improperly.[5] But in every case, where the maker is held to be bound to the *bona fide* holder on an instrument filled up by an agent in violation of instructions, it will be found that the additions

Snyder *v.* Van Doren, 46 Wis. 602; Jones *v.* Shelbyville Ins. Co., 1 Met. (Ky.) 58; Ives *v.* Farmers' Bank, 2 Allen, 236; Androscoggin Bank *v.* Kimball, 10 Cush. 373; Hardy *v.* Morton, 66 Barb. 527; Joseph *v.* Nat. Bank, 17 Kan. 259; Bank of Commonwealth *v.* Curry, 2 Dana, 142; Bank of Limestone *v.* Perrick, 5 T. B. Mon. 25; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Michal *v.* Bate, 10 Yerg. 429; Waldron *v.* Young, 9 Heisk. 777; Rich *v.* Starbuck, 51 Ind. 87.

[1] Russell *v.* Langstaffe, 2 Dougl. 514. "Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody — or, in other words, it is the act of the principal, and he is bound by it." Bank of Pittsburg *v.* Neal, 22 How. 107; Davison *v.* Lanier, 4 Wall. 457; Angle *v.* N. W. Mutual Life Ins. Co., 92 U. S. 330.

[2] London & S. W. Bank *v.* Wentworth, 42 L. T. R. 188; Diercks *v.* Roberts, 13 S. C. 388; Russell *v.* Langstaffe, 2 Doug. 514; Fullerton *v.* Sturgis, 4 Ohio St. 529; Yocum *v.* Smith, 63 Ill. 321. In Schryver *v.* Hawkes, 22 Ohio St. 208, the *bona fide* holder was allowed to recover the face value of the note, where the maker had delivered it blank as to the amount to be paid, except that the amount was given in marginal figures, and the person who filled the blank, changed the figures to correspond to the written amount. This was held not to be such a forgery, as to free the maker from liability to the *bona fide* holder.

[3] Putnam *v.* Sullivan, 4 Mass. 45; Frank *v.* Lilienfeld, 33 Gratt. 384.

[4] Montague *v.* Perkins, 22 Eng. L. & Eq. 516.

[5] Redlich *v.* Doll, 54 N. Y. 238; Page *v.* Morrell, 3 Abb. App. 433; Overton *v.* Mathews, 35 Ark. 154.

or insertions made by the agent are in conformity with the apparent character and object of the blank. A *bona fide* holder cannot recover on an instrument containing unusual provisions which conflict with the ordinary parts of like instruments, or which are repugnant to its object. Indeed, the holder of such an instrument cannot properly be called a *bona fide* holder; for a holder is charged with every inconsistency or defect appearing on the face of the instrument.[1] But, of course, the holder must have taken the instrument, which has been improperly filled, in good faith, without notice or reasonable suspicion of any violation of instructions, and for a valuable consideration.[2]

The authorities are, however, not agreed as to what constitutes notice of a want of authority to fill the blanks. Some of the cases maintain that if the holder knows that blanks have been filled up by an agent, he is charged with

[1] "But the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor pervert the meaning and scope of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered." Angle *v.* N. W. Mut. Ins. Co., 92 U. S. 331. See also Goodman *v.* Simonds, 20 How. 361; Bank of Pittsburg *v.* Neal, 22 How. 108; Ivory *v.* Michael, 33 Mo. 400; McGrath *v.* Clark, 56 N. Y. 36; Coburn *v.* Webb, 56 Ind. 100; McCoy *v.* Lockwood, 71 Ind. 319.

[2] Davidson *v.* Lanier, 4 Wall. 456, the court saying: "The delivery of a bill of exchange signed and indorsed in blank, only authorizes the receiver to fill it up in conformity with the authority given him. If there has been no agreement, the authority is general; if there has, it must be pursued. The burden of proof that there was an agreement and that its terms have been violated, is, in such a case, upon the defendant; but if he can make the proof it will avail him. No person, unless authorized, either directly or by just inference from the nature of the transaction, can fill up a blank bill for his own benefit, nor can such a bill be enforced against the drawer, and indorser against any one who takes it in bad faith — that is, with knowledge that it has been filled up without authority or in fraud." Johnson *v.* Blasdale, 1 Smedes & M. 17; Hemphill *v.* Bank of Alabama, 6 Smedes & M. 44; Hatch *v.* Searles, 2 Sm. & Gif. 147.

the duty of inquiring at his peril into the limitations of the agent's powers.[1] But the better opinion would seem to be that he is permitted to presume that the agent has not exceeded his authority, if there are no unusual and inconsistent provisions in the instrument.[2]

§ 284. **Instruments written over blank signatures.** — But a distinction should be drawn, in respect to the rights of *bona fide* holders, between instruments in blanks given to agents, with the express or implied authority to fill them up, and instruments written out in full by an agent or third person over a signature, which has been written, for an altogether different purpose, on a blank piece of paper. Where a blank instrument, signed by one, is placed into the hands of another, whether with or without authority to fill the same and negotiate it, the persons, whose names are signed thereto, should be held liable to a *bona fide* holder, on the general ground that they have reposed confidence in the third person in intrusting the blank instrument to his care, and should therefore suffer the loss flowing from his breach of trust. But where one has merely written his name on a blank piece of paper, — it matters not for what purpose if it be not for the purpose of signing some kind of contract, — and some one without authority writes out in full a promissory note over his signature, there is no room for the implication of any authority to so write a promissory note; nor can he be charged with negligence in giving his blank signatures to another, for he can do this for many unobject-

[1] Van Duzer *v.* Howe, 21 N. Y. 531. "If the holder has notice of the imperfection [that the signature was made in blank] he can be in no better situation than the person who gave it in blank." Hatch *v.* Searles, 2 Sm. & Gif. 147.

[2] Orrick *v.* Colston, 7 Gratt. 189; Snyder *v.* Van Doren, 46 Wis. 602; Huntington *v.* Branch Bank, 3 Ala. 186; Story on Bills, § 222; 1 Parsons' N. & B. 109; 1 Daniel's Negot. Inst., § 147. See also Angle *v.* N. W. Mut. Ins. Co., 92 U. S. 331; McCoy *v.* Lockwood, 71 Ind. 319.

ionable purposes; as, for example, to enable the person receiving it to identify his signature on valid commercial paper. In all such cases it is held that the *bona fide* holder cannot recover of the persons, whose names appear signed to the instrument.[1] But I apprehend that the party who writes his name for some other purpose than to execute a contract, is guilty of negligence if he writes it on a blank negotiable instrument; and if he gives the same to another for the purpose of identifying his signature, or for any other lawful purpose, he will be liable thereon to a *bona fide* holder for any amount for which it might be written up.[2]

[1] Nance *v.* Lary, 5 Ala. 370; Caulkins *v.* Whistler, 29 Iowa, 495, Beck, J., saying: "The case differs materially in its facts from the case cited in support of plaintiff's right to recover. In these cases blanks were filled up contrary to the direction of the maker or without his authority. But in all of such cases the makers intended to execute an instrument which should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention of the makers; but in all such cases there were makers and instruments, and, through the frauds of those to whom the instruments were intrusted, they were thus made to be of different effect than was designed by the makers. In these cases it is correctly held, that while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments as against holders in good faith and for value. The reason is obvious. The maker ought rather to suffer on account of the fraudulent act of one to whom he intrusts his paper, or who is made agent in respect to it, than an innocent party. The law esteems him in fault in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon this negligence. In the case under consideration no fault can be imputed to the defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant cannot be regarded as being so far in fault in the transaction, that he ought to bear the loss resulting from the crime." See Kline *v.* Guthrie, 42 Ind. 227; Deturler *v.* Besh, 44 Ind. 70.

[2] But see Cline *v.* Guthrie, 42 Ind. 227, where one was held not liable

§ 285. **Instruments executed by mistake or under false representations.** — It has happened, quite frequently, particularly in the Western States, that parties have been induced by false representations to sign negotiable instruments, under the mistaken belief that they were signing some other kind of contract. In several of the States, these contracts have been held to be void, even in the hands of *bona fide* holders, on the ground that there was no voluntary execution of a negotiable instrument.[1] In Nebraska, it is held to be no negligence for one to omit to read an instrument, relying on the reading of it by another.[2]

But the authorities are generally opposed to this view of the rights of the *bona fide* holder. They are agreed that the *bona fide* holder should not recover on an instrument, whose maker is a blind man, or one who cannot read, and to whom its contents have been falsely read or stated. Such a person cannot be expected to do more than require the instrument to be read to them; and if the contents are

to a *bona fide* holder on an instrument, which he signed, without knowing its character and supposing it to be a blank piece of paper, for the purpose of showing how his name was spelled. But this case is complicated by the fact that the party signing his name under these circumstances did not deliver it to the party who made a fraudulent use of it. As to the effect of such a fact, see *ante*, § 282.

[1] Gibbs *v.* Linabury, 22 Mich. 492, Graves, J., saying: "Now, when a party never designed to put, or cause to be put, any sort of negotiable paper in circulation, when the thought of doing so never entered his mind, when he had never bargained to do so, when he has never consciously been privy to any attempt to set such paper afloat, how can it be said that his will in any way assented to the concoction of such a contract so as to make him an object of the rule. So far as this principle is concerned, it is not perceived how the instance here supposed would differ from that when the act leading to the mischief is done by an insane man, or is compelled by duress. The point is, that the will does not go with the act." See also to the same effect, Anderson *v.* Walter, 34 Mich. 113; Kellogg *v.* Steiner, 29 Wis. 627; Butler *v.* Karns, 37 Wis. 61; Briggs *v.* Ewart, 51 Mo. 251; Martin *v.* Smylee, 55 Mo. 577; Corby *v.* Weddle, 57 Mo. 452, overruled by Shirts *v.* Overjohn, 60 Mo. 315.

[2] Palmer *v.* Largent, 5 Neb. 223.

misstated to them, there is neither negligence nor the exercise of will present, if they sign the paper under the mistaken belief that it is something else than a negotiable instrument.[1] Even one who is unable to read or write, may be guilty of negligence. As was said by Chief Justice Gibson, if he "will not demand to have it read and explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or law."[2]

But there is never any excuse for one who is able to read himself, if he does not do so, but contents himself with hearing it read by another. By doing so, he unnecessarily reposes confidence in another, and if his confidence proves to be misplaced, he must abide the consequence. Such a person cannot, on the ground of mistake and misrepresentation, prevent a recovery against him by a *bona fide* holder. At least that is the opinion of a majority of the courts.[3]

[1] Putnam *v.* Sullivan, 4 Mass. 45; Whitney *v.* Snyder, 2 Lans. 477; Fenton *v.* Robinson, 11 N. Y. S. C. (4 Hun) 252. See Chapman *v.* Rose, 56 N. Y. 137; Schuylkill Co *v.* Copley, 67 Pa. St. 386. The same rule has been applied to a German, who could not read or write English, and who had been misled by a false reading of the instrument. Fayette Co. S. B. *v.* Steffer, 54 Iowa, 214; Walker *v.* Ebert, 29 Wis. 196. See also Puffer *v.* Smith, 57 Ill. 527; Van Brunt *v.* Singley, 85 Ill. 281; First Nat. Bank *v.* Lierman, 5 Neb. 247; Griffiths *v.* Kellogg, 39 Wis. 290.

[2] Greenfield's Estate, 2 Harris, 496.

[3] Ruddell *v.* Phalor, 72 Ind. 533; Ruddell *v.* Dillman, 73 Ind. 521; Fisher *v.* Von Behren, 70 Ind. 19; McCormack *v.* Molburg, 43 Iowa, 561; Hopkins *v.* Hawkeye Ins. Co., 57 Iowa (1881) 203; Roach *v.* Karr, 18 Kan. 529; Chapman *v.* Rose, 56 N. Y. 137, overruling and explaining prior cases in the lower courts; Shirts *v.* Overjohn, 60 Mo. 315 (overruling prior cases); Fredericks *v.* Clemens, 60 Mo. 313, Citizens' Nat. Bank, *v.* Smith, 55 N. H. 393; Leach *v.* Nichols, 55 Ill. 273; Ross *v.* Doland, 29 Ohio St. 473; Kimble *v.* Christie, 55 Ind. 140; Woollen *v.* Wise, 73 Ind. 201; Woolen *v.* Whitacre, 73 Ind. 201; First Nat. Bank *v.* Latton, 67 Ind 256; Fisher *v.* Von Behren, 71 Ind. 19; Indiana Nat. Bank *v.* Welkerly, 67 Ind. 345; Thomas *v.* Ruddell, 66 Ind. 326; Maxwell *v.* Morehead, 66 Ind 301; McDonald *v.* Muscatine Nat. Bank, 27 Iowa, 319. In Douglass *v.* Matting, 29 Iowa, 498, Beck, J., said: "The defendant trusted the one with whom he was dealing with the preparation of the instrument. The instrument as prepared

In Illinois, it is now provided by statute that an instrument is void even in the hands of a *bona fide* holder, the signature to which has been obtained by the fraudulent misrepresentations of the payee as to the character and liability of the paper signed.[1]

§ 286. **Instruments delivered in violation of instructions.** — It has been held in England that if a negotiable instrument is negotiated by one, for whose accommodation it was made, in violation of the conditions upon which negotiation was authorized, a *bona fide* holder would not get a good title thereto, on the ground that there had been no delivery by any duly authorized agent, and consequently no liability was created by the unauthorized transfer of the

was not what defendant had agreed to sign, but was voluntarily executed by him. The act of the agent was a fraud whereby the defendant was induced to make a note, and not the false making of it, which is necessary to constitute a forgery. * * * Now it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents. The law will favor, as between the holder and maker in such a case, the more innocent and diligent. The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of this act are about to be visited upon him, he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence. He can not certainly claim protection either on the ground of his innocence or diligence. The rule contended for by the appellee would tend to destroy all confidence in commercial paper. It is better that defendant, and others who so carelessly affix their names to paper, the contents of which are unknown to them, should suffer from the fraud which their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country interfered with and unsettled."

[1] Hubbard *v.* Rankin, 71 Ill. 129; Richardson *v.* Schirtz, 59 Ill. 313; Auten *v.* Gruner, 90 Ill. 300. But it still seems to be necessary in that State to show that he was acting with ordinary prudence and caution in trusting to the representations of another as to the contents. Hornes *v.* Hale, 71 Ill. 552. See also Swannell *v.* Watson, 71 Ill. 456.

instrument.[1] But nowhere in the United States is this rule followed, at least where there is a conditional delivery to the payee, and he negotiates it in violation of the condition. The courts are unanimous in holding that the *bona fide* holder can recover of the maker, on the same ground as he is held to be entitled to recover of one who intrusts a blank instrument to another to be filled up for a given sum of money, and the latter fills it up for a larger amount, viz.: that having reposed confidence in this person, the maker must bear the loss resulting from the breach of confidence, rather than the *bona fide* holder, who has thus been

[1] Awde *v.* Dixon, 6 Exch. 869. In this case, the defendant had agreed to join his brother in making a promissory note for the latter's accommodation, provided that a third person joined also in its execution, and in signing the defendant left room enough before his name for another signature. The note fell into the hands of a *bona fide* holder. In rendering judgment in favor of the defendant, Parke, B., said: "It is unnecessary to say whether this instrument is a forgery or not, but there is certainly ground for contending that the making of it complete, contrary to the directions of the defendant, renders it a false instrument as against him. I do not gainsay the position that a person who puts his name to a blank paper impliedly the filling of it up to the amount that the stamp will cover. But this is a different case. Here the instrument, to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument, on one condition only, that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority, where, in a case of refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. * * * It is a fallacy to say that the plaintiff is a *bona fide* holder for value; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority, consequently the instrument is void as against the defendant."

invited to trust the agent.[1] There has been some disposition on the part of the American courts to follow the English precedent so far as to hold that when a negotiable instrument is delivered to a third person to hold as an *escrow*,[2] and this agent delivers it to the payee, before the condition happens, no title passes, and not even a *bona fide* holder can recover on such an instrument.[3] But the better opinion is that even in the case of an *escrow*, if the instrument has been negotiated in violation of the conditions on which the delivery was made, a *bona fide* holder can nevertheless recover on it against the maker.[4]

[1] Smith *v.* Moberly 10 B. Mon. 269; Taylor *v.* Craig, 2 J. J. Marsh. 449; Foy *v.* Blackstone, 31 Ill. 538; Bonner *v.* Nelson, 57 Ga. 433; Bank of Missouri *v.* Phillips, 17 Mo. 30; Stewart *v.* Anderson, 59 Ind. 375; Ayres *v.* Milroy, 53 Mo. 516; Black River Ins. Co. *v.* N. Y. L. & T. Co., 73 N. Y. 282; Gage *v.* Sharp, 24 Iowa, 15; Deardoff *v.* Foresman, 28 Ind. 481; Merriam *v.* Rockwood, 47 N. H. 81; Farmers', etc., Bank *v.* Humphrey, 36 Vt. 554; Passumpsic Bank *v.* Goss, 31 Vt. 315, Barrett, J., saying: "The propriety of this view is strongly illustrated by the well known course of this kind of business. The instance has hardly occurred of a bank making inquiry when paper, genuine and apparently designed for discount, is presented at the counter, whether as against the makers it is entitled to be used. If the court should sustain this defense in this case, it would become necessary for banks, and equally for all persons, upon the offer of a note with sureties, in the usual course of business, to call before them all the makers, and ascertain, by personal inquiry, whether it was 'all right,' and not subject to some side agreement or reservation in favor of some of the sureties, that might render it invalid as against them. We think such a rule of law would not only contravene the well established usages of business, but would surprise, if not shock, the judgment of the community upon this subject."

[2] See *ante*, § 34*d*, for a discussion of delivery as an *escrow*.

[3] Chipman *v.* Tucker, 38 Wis. 43; Cole, J.: "Delivery of a promissory note by the maker is necessary to a valid inception of the contract, and until there is a delivery, the note has no vitality, and the rules of commercial paper have no application to it." See also Roberts *v.* McGrath, 38 Wis. 52; Roberts *v.* Wood, 38 Wis. 60. See also Babcock *v.* Beman, 1 Root, 87; Couch *v.* Meeker, 2 Conn. 302.

[4] 1 Parsons' N. & B. 51; Vallett *v.* Parker, 6 Wend. 615; Moore *v.* Miller, 6 Lans. 396. Fearing *v.* Clark, 16 Gray, 474; Watson *v.* Russell, 3 B. & S. 34; 5 B. & S. 968; Mills *v.* Williams, 16 S. C. 593.

§ 287. **Negotiable instruments executed under duress.** — It is doubtful whether a *bona fide* holder can recover on an instrument, whose execution was procured by duress. As between the original parties there can be no action on such an instrument.[1] In England, it has been held that *bona fide* holders of an instrument, obtained by the duress of the maker, cannot recover on it, unless he gives some evidence of consideration.[2] The inference from this decision is that the *bona fide* holder can recover, if he proves himself to be a holder for value. But this opinion can not be considered consonant with other principles of law, applicable to negotiable instruments. If the exercise of the will power, in the execution of a negotiable instrument is necessary to give it life,[3] even in the hands of a *bona fide* holder; then, surely one who signs an instrument under duress, cannot be held bound on it to any holder. And this is the rule laid down by the authorities in Scotland [4] and in this country by the latest authorities.[5] But

[1] Bush *v.* Brown, 49 Ind. 573; Taylor *v.* Jacques, 106 Mass. 291. It seems that a contract procured by duress, is only voidable, if the duress consists only of threats; but if it extends to such a use of physical compulsion as to make the ostensible party a mere machine, it is absolutely void. Fairbanks *v.* Snow, 13 N. E. Rep. 596; Vintage *v.* King, 4 Allen, 565; Foss *v.* Hildreth, 10 Allen, 26, 80; Worcester *v.* Eaton, 13 Mass. 371; Fisher *v.* Shattuck, 17 Pick. 252; Lewis *v.* Bannister, 16 Gray, 500; Clark *v.* Pease, 41 N. H. 414; Whelpdale's Case, 3 Coke, 241; Duncan *v.* Scott, 1 Camp. 100.

[2] Duncan *v.* Scott, 1 Camp. 100.

[3] See *ante*, § 282.

[4] Thompson on Bills (Wilson's ed.), 62, cited in 1 Daniel's Negot. Inst., § 857.

[5] 1 Daniel's Negot. Inst., §§ 857, 858, saying: "Indeed we can discover no principle which would compel any person, whether a party to negotiable or other kind of instrument, to pay it, when under violent duress — that is under the compulsion of force with the only alternative of submitting to great bodily injury or indignity. Consent is of the essence of every contract, and if it is not given, the party should not be bound if he had no alternative but to seem to give it, or suffer grievous wrong. He creates no trust, he commits no negligence, whereby the confidence

the English ruling has been followed by some of the American authorities, on the ground that since negotiable instruments executed under duress are not absolutely void, they are good in the hands of a *bona fide* holder.[1]

A negotiable instrument is voidable on account of duress only by those parties who executed it under duress. Sureties and other joint obligors are still bound on such instruments, if they have signed it with knowledge of the duress. If they were ignorant of the duress, they can not be held liable, since they have been misled, and have signed under a mistake of facts.[2] The same rule has been applied to an accommodation indorser who indorses without knowledge of the duress. He is held not to be liable to the holder who is guilty of the duress towards the maker. He would of course be liable to a *bona fide* holder.[3]

of another can be betrayed. He is in no default, having a right of self-defense in preferring his own life and safety to the chances of pecuniary injury to others; and his extorted act is nothing more nor less than the act of the wrong-doer, who uses his person as the instrument of forging his name. Threats to inflict slighter wrongs would, as we have seen, stand on a different footing." See also, to same effect, 1 Parsons' N. &. B. 276. In Loomis *v.* Rucker, 56 N. Y. 465, a married woman was coerced by her husband to sign a promissory note, as a charge on her separate estate, and it was held to be absolutely void.

[1] Hogan *v.* Moore, 48 Ga. 156; Clarke *v.* Pearce, 41 N. H. 414; Edwards on Bills, 325; Story on Notes, § 188; Story on Bills, § 185. See Griffith *v.* Sitgreaves, 90 Pa. St. 161. See the same ruling applied to *bona fide* holders of deeds of conveyance, and mortgages. Deputy *v.* Stapleford, 19 Cal. 302; Rogers *v.* Adams, 66 Ala. 600; Lane *v.* Blizzard, 70 Ind. 23.

[2] Hazard *v.* Griswold, 21 Fed. Rep. 178; Bowman *v.* Hilter, 130 Mass. 153; Harris *v.* Carmody, 131 Mass 51; McClintick *v.* Cummins, 3 McLean, 158; Plummer *v.* People, 16 Ill. 358; Spaulding *v.* Crawford, 27 Tex. 155. See Osborn *v.* Robbins, 36 N. Y. 365; Thompson *v.* Lockwood, 15 Johns. 256; Evans *v.* Huey, 1 Bay, 13; Fay *v.* Oatley, 6 Wis. 42; State *v.* Bruntley, 27 Ala. 44.

[3] Griffith *v.* Sitgreaves, 90 Pa. St. 161, Paxton, J., saying: "We are next to consider the question whether the defendant, who is sued as indorser of the notes, can take advantage of the duress practiced upon the

§ 288. **Bona fide holders protected from defenses by estoppel.** — If the purchaser of a negotiable instrument, for the purpose of allaying any suspicions he might have

maker. In Huscombe *v.* Standing, Cro. Jac. 187, the defendant having been sued on a bond, on which he was surety for one Street, entered a plea that the bond was obtained by duress of his principal. The plaintiff demurred to this plea, and, without argument, it was held that 'it was not any plea for the surety, although it had been a good plea for the said Street; for none shall avoid his own bond for the imprisonment or duress of any other than himself.' The same doctrine is recognized in Bacon's Abridg., title Duress, A, and in 2 Rolle Abridg. 124. Mantell *v.* Gibbs, 1 Brownlow, 62; Robinson *v.* Gould, 11 Cush. 55; Plummer *v.* People, 16 Ill. 358; McClintick *v.* Cummins, 3 McLean, 158; Thompson *v.* Lockwood, 15 Johns. 259, were cited by plaintiffs as maintaining the doctrine that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. On the other hand, Strong *v.* Grannis, 26 Barb. 122; Osborn *v.* Robbins, 36 N. Y. 365, and Fisher *v.* Shattuck, 17 Pick. 252, were cited on behalf of defendant as sustaining the opposite view. I have examined these cases with some care, and do not regard them as controlling authority on either side. They depend very much on the pleadings or their special circumstances. I have no doubt of the correctness of the general principle laid down in the older cases, that duress, to be a good plea, must be offered to the person who seeks to take advantage. * * * In all the cases cited, the duress was either upon the party seeking to avoid the instrument, or it was known to him. * * * It by no means follows that because duress of another is not a good plea, and that in some instances it may not avail as a defense, that it cannot be set up so successfully in any case. Had the defendant, after indorsing these notes, passed them to the plaintiffs and received the money therefor, it is very clear he could not set up the defense of duress of the maker; so if he had indorsed them with notice of the duress, or if the notes were in the hands of an innocent third party for value. In these and many other instances that might be named the defense referred to would, for obvious reasons, be unavailing. The case in hand, however, differs materially from them and from all the cases cited. Here the defendant was the surety of the maker, nothing more, and defends under the broad plea of *non assumpsit.* The form of the transaction is not material so long as the contention is between the original parties. The defendant's contract is to pay the notes, if his principal fails to do so, and he may be proceeded against immediately upon such failure. But upon payment of the money he has his remedy over against his principal. It is a recognized doctrine in the law of surety, that whatever discharges the

concerning its genuineness and legality, should make special inquiries of the maker or other prior parties to the instrument before purchasing it; and if he should receive assurances of its genuineness and legality and he should buy the instrument in reliance upon these assurances, those who gave him the assurances would thereafter be estopped from setting up any defense against such a holder.[1] But

principal debtor, discharges also the surety. There are exceptions to the rule, as where one had signed a joint and several note with a married woman as surety. Nor will this rule apply to cases in which a surety is required, for the very reason that the principal *may* have a defense that will defeat the claim against him.

"In these and the like cases the surety knows when he binds himself that he has no remedy over. He is not, therefore, misled. The defendant indorsed the notes without any knowledge of anything to put him upon inquiry of the duress practiced upon his principal. The result will be, if a recovery is had against the defendant, he will have no redress against the maker, and this by reason of the duress upon the maker, the act of the plaintiffs. He is therefore directly injured by it, and has a right to defend upon that ground. Had he signed the notes with knowledge of the duress, it would have been his folly, and the consideration being good, the plaintiffs would have been entitled to recover. But they made the mistake of keeping the maker a *quasi*-prisoner in New York by threats, whilst the notes were sent to the indorser for his signature, thus depriving him of his remedy over against his principal. Indorsing this, the plaintiffs overshot themselves."

[1] Tohey *v.* Chipman, 13 Allen, 133; Crout *v.* De Wolf, 1 R. I. 393; Lynch *v.* Kennedy, 34 N. Y. 151; Vanderpool *v.* Brake, 28 Ind. 130; McCabe *v.* Raney, 32 Ind. 312; Rose *v.* Hurley, 39 Ind. 82; Vaughn *v.* Terrall, 57 Ind. 182; Reedy *v.* Brunner, 60 Ga. 107; Plant *v.* Voegelin, 30 Ala. 160; Cloud *v.* Whiting, 38 Ala. 57; Brooks *v.* Martin, 43 Ala. 360, Peters, J., saying: "It is difficult to conceive what would make a note 'all right' that could not be collected by suit, or that would not be paid at maturity, if the maker was able. * * * Had there been a suit pending on the note between Brooks and Martin, and the latter had come into the court and pleaded that the note was 'all right' the court could not have refrained from giving judgment against him. Now, by his words, he puts in this plea before suit is brought, and the law will not permit him to withdraw it after suit is brought." See also Fleischman *v.* Stern, 90 N. Y. 110; Casco Bank *v.* Keene, 53 Me. 104; Greenfield Bank *v.* Crafts, 4 Allen, 447; Beeman *v.* Duck, 11 M. & W. 251; Leach *v.* Buchanan, 4 Esp. 226; Hefner *v.* Dawson, 63 Ill. 453; Woodruff *v.*

in all cases of representations by the primary obligors, where they do not amount to unqualified promises to pay, such as that the paper is genuine or legal or good, they will not operate as estoppel, in respect to any defense of which he is ignorant at the time that he made the representation; certainly not where the plaintiff buys after maturity.[1]

In order that the representation may operate as an estoppel, it must be made after the execution of the instrument, and to one or more parties, who are expected to purchase the instrument. A written certificate attached to a note to the effect that the note is good and free from defenses has been held to create no estoppel. As Mr. Daniel says, "it is too much like having 'I am honest' chalked on his back,"[2] and is calculated to arouse rather than to allay suspicion. Such a certificate has been held in New York to work an estoppel,[3] but the better opinion seems to be that it would not work an estoppel,[4] any more than the words "for value

Munroe, 33 Md. 158; Hefner *v.* Vandolah, 62 Ill. 483; *s. c.* 57 Ill. 520; Dow *v.* Sperry, 29 Mo. 390; Workman *v.* Wright, 33 Ohio St. 405 (31 Am. Rep. 546); Rudd *v.* Mathews, 79 Ky. (1881) 479 (37 Am. Rep. 704).

[1] Mackay *v.* Holland, 4 Met. 69; Sackett *v.* Kellar, 22 Ohio St. 554; Allum *v.* Perry, 68 Me. 232; Cloud *v.* Whiting, 38 Ala. 57. But see Reedy *v.* Brunner, 60 Ga. 107.

[2] 1 Daniel's Negot. Inst., § 862.

[3] Chamberlain *v.* Townsend, 26 Barb. 611; Truscott *v.* Davis, 4 Barb. 495; Mechanics' Bank *v.* Townsend, 29 Barb. 569; Clark *v.* Sisson, 4 Duer, 408.

[4] Jaqua *v.* Montgomery, 33 Ind. 46. In this case it was held to be no estoppel, even as to *bona fide* holders. Gregory, C. J., said: "The instrument signed at the time the note was executed has not the first element of an estoppel. It is no more than what the note itself imported on its face. It was obtained by the same fraudulent act that proved the execution of the note. It was a part of the same contract, and was as much a part of the note as if it had been incorporated in it. It was a statement upon which the appellant had no right to rely. Indeed, I think that such a paper accompanying an ordinary promissory note should have the effect of exciting suspicion that all was not right. It looks too much like the act of the thief in attempting to cover up his crime."

received," precludes an inquiry into the consideration.[1] On the other hand, in order to operate as an estoppel, the representation must be made to the person intended to be influenced by it, before he purchases the commercial instrument, or at any rate before he pays value for it. If the representation is made after the completion of the transfer, it is not good as an estoppel.[2]

The party, to whom the representation is made, must rely upon its truth, in order to claim the protection of an estoppel. If, therefore, he does not merely have suspicions concerning the genuineness or legality of the instrument, but he absolutely knows that the instrument is subject to some good defense, such as want of consideration or fraud, he cannot claim the protection of an estoppel on the statement of the maker that the instrument is free from legal objections. For he knows that the statement is incorrect, and he is not misled by it.[3]

Finally, it has been held that an estoppel will only enable the holder to be indemnified to the amount he has been induced to invest in the purchase of the instrument on the faith of the defendant's representations unless the defendant is guilty of fraud. Instead of recovering of the defendant the face value of the paper, he can only recover the consideration he gave for it, together with legal interest on the same.[4]

[1] Gaul *v.* Willis, 26 Pa. St. 259.

[2] Moore *v.* Robinson, 62 Ala. 537; Crossan *v.* May, 68 Ind. 242; Windle *v.* Canaday, 21 Ind. 248; Stutsman *v.* Thomas, 39 Ind. 384.

[3] Sackett *v.* Kellar, 22 Ohio St. 554; Watson *v.* Hoag, 40 Iowa, 143; Platt *v.* Jerome, 2 Blatchf. C. C. 186.

[4] Campbell *v.* Nichols, 33 N. J. L. 88, Beasley, C. J., saying: "If the drawer of a note should through mistake admit its validity to a person who, to the knowledge of such drawer, was about to purchase it, after such purchase for full value, it is clear he could not aver his mistake and set up the invalidity of the note as a defense. In such a case it is right that he should bear the loss whose carelessness occasioned it. But suppose the purchaser gave only part value for the note, upon what prin-

§ 289. **What is meant by bona fides.** — It has been already stated that in order that a holder may claim the right to be protected from the defenses not appearing on the face of a commercial instrument, it must be shown that he took it in good faith. If he is guilty of bad faith, *mala fides*, he cannot claim to be a *bona fide* holder. It is therefore necessary to determine what constitutes such good faith as to make one a *bona fide* holder. The earlier English authorities maintained that *mala fides* in this case, as in any other legal transaction, meant participation in some fraud, or other wrong.[1] In a later case, Lord Ten-

ciple should he be allowed to recover more than the money thus paid of the drawer, who, although he inadvertently admitted his liability, in point of fact owes nothing on the paper? The true measure is, that the party acting on the faith of a representation should be indemnified from loss, by the application of the doctrine of estoppel *in pais*, and these limits, as I think, take the whole field of the doctrine. The rule is designed to protect against fraud, either in fact or in law; but the remedy does not extend beyond the injury. Neither good policy, nor honest dealing requires that one who has made an admission which has influenced the conduct of another, should be estopped by such admission from showing the truth of the case, except to the extent of permitting the person misled from recovering indemnification. For it is to be remembered that the principle of estoppel applies as well to cases of unintentional deceptions as to designed and actual frauds, and it would certainly seem plain, that, in the former class of cases, the limitation of the doctrine above indicated is absolutely necessary for the accomplishment of the ends of justice."

[1] Miller *v.* Race, 1 Bur. 452. In Lawson *v.* Weston, 4 Esp. 56, where the court was urged to maintain that the holder of a bill of exchange which had been lost, and negotiated by the finder, notwithstanding an extensive advertisement of it in the newspapers, — could not recover on it without showing that he had used reasonable diligence in inquiring into the circumstances surrounding the bill and the person who offered to negotiate it, Lord Kenyon said: "I think the point in this case has been settled by the case of Miller *v.* Race, in Burrow. If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated would be at once to paralyze the circulation of all the paper in the country and with it all its commerce. The circumstance of the bill having been lost, might have been

terden so far modified the existing rule, as to hold that one is not a *bona fide* holder who took the paper under circumstances which ought to have excited the suspicions of a prudent and careful man.[1] This ruling was subjected to the universal criticism of both the legal and mercantile world, and the complaints of the merchants and bankers induced the court under the lead of Lord Denman, C. J., to require proofs of *gross* negligence, to take away from one the character of a *bona fide* holder.[2] Finally, in response to the demands of public opinion in the mercantile world, the court repudiated in its entirety Lord Tenterden's doctrine of negligence, as being the foundation of *mala fides*, and returned to the definition of good faith given by Lord Kenyon.[3]

In the United States, the rule laid down by Lord Tenterden, requiring the holder to make diligent inquiries whenever there were suspicious circumstances attending the negotiation of the instrument, was followed and adopted by Chancellor Kent,[4] and by the earlier decisions in many of the States, which have been since overruled.[5] It is still

material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement, and it would be going great lengths to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000."

[1] Gill *v.* Cubitt, 3 Barn. & Cres. 466; Strange *v.* Wigney, 6 Bing. 677 (19 E. C. L. R.); Snow *v.* Peacock, 2 C. & P. 215; Beckwith *v.* Corrall, 2 C. & P. 259.

[2] Crook *v.* Jadis, 5 Barn. & Ad. (27 E. C. L. R.) 909.

[3] Goodman *v.* Harvey, 4 Ad. & El. 870; Arbouin *v.* Anderson, 1 Ad. & El. (N. S.) 498; Uther *v.* Rich, 10 Ad. & El. 784; Raphael *v.* Bank of England, 33 Eng. L. & Eq. 278; Easeley *v.* Crockford, 10 Bing. (25 E. C. L. R. 116) 243.

[4] 3 Kent Com. 103, 104.

[5] Hamilton *v.* Marks, 52 Mo. 81; 63 Mo. 167; Buckner *v.* Jones, 1 Mo. App. 538; Edwards *v.* Thomas, 2 Mo. App. 283; Ayer *v.* Hutchins, 4 Mass. 370; Holbrook *v.* Mix, 1 E. D. Smith, 154; Pringle *v.* Phillips, 5 Sand. 157; Wiggins *v.* Bush, 12 Johns. 306; Hall *v.* Hale, 8 Conn. 336; Beltzhoover *v.* Blackstock, 3 Watts, 20; Cone *v.* Baldwin, 12 Pick. 545.

the rule in some of the States.[1] But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the *bona fide* character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument.[2] There cannot be any doubt as to the great value to the commercial world of this latter ruling. If a banker or other indorsee of a negotiable instrument had to make an inquiry into every suspicious circumstance, that attended the proffer of the instrument for negotiation, it would clog the wheels of commerce, and deprive the commercial paper of its chief

[1] Sanford *v.* Norton, 14 Vt. 234; Varin *v.* Hobson, 8 La. 50; Lapice *v.* Bowman, 17 La. 152; Nicholson *v.* Patton, 13 La. 216; Lanfear *v.* Blosman, 1 La. Ann. 148; Marsh *v.* Small, 3 La. Ann. 402; Adkins *v.* Blake, 2 J. J. Marsh. 40; McConnell *v.* Hodson, 2 Gilm. 640; Russell *v.* Hadduck, 3 Gilm. 233; Hunt *v.* Sandford, 6 Yerg. 387; Ryland *v.* Brown, 2 Head, 273; Merrill *v.* Duncan, 7 Heisk. 164.

[2] Murray *v.* Lardner, 2 Wall. 110; Swift *v.* Tyson, 16 Pet. 1; Goodman *v.* Simonds, 20 How. 367; Shaw *v.* Railroad Co., 101 U. S. 564; Swift *v.* Smith, 102 U. S. 444; Bank of Pittsburgh *v.* Neal, 22 How. 108; Worcester Co. Bank *v.* Dorchester, etc., Bank, 10 Cush. 488; Wyer *v.* Dorchester, etc., Bank, 11 Cush. 51; Spooner *v.* Holmes, 102 Mass. 503; Smith *v.* Livingston, 111 Mass. 342; Freeman's Nat. Bank *v.* Savery, 127 Mass. 75; Carroll *v.* Hayward, 124 Mass. 120; Stimson *v.* Whitney, 130 Mass. 591; Kellogg *v.* Curtis, 69 Me. 212; Farrell *v.* Lovett, 68 Me. 326; Welsh *v.* Sage, 47 N. Y. 147; Birdsall *v.* Russell, 29 N. Y. 249; Magee *v.* Badger, 34 N. Y. 247; Belmont *v.* Hoge, 35 N. Y. 67; Seybel *v.* Nat. Currency Bank, 54 N. Y. 288; Hamilton *v.* Vought, 34 N. J. L. 190; Brush *v.* Scribner, 11 Conn. 388; Craft's App., 42 Conn. 146; Rowland *v.* Fowler, 47 Conn. 347; Phelan *v.* Moss, 67 Pa. St. 62; McSparran *v.* Neely, 91 Pa. St. 17; Ellicott *v.* Martin, 6 Md. 509; Commercial, etc., Nat. Bank *v.* First Nat. Bank, 30 Md. 11; Maitland *v.* Citizen's Nat. Bank, 40 Md. 540; Citizens' Nat. Bank *v.* Hooper, 47 Md. 88; Frank *v.* Lilienfeld, 33 Gratt. 390; Witte *v.* Williams, 8 S. C. 290; Walker *v.* Kee, 14 S. C. 142; Grenaux *v.* Wheeler, 6 Tex. 526; Houry *v.* Eppinger, 34 Mich. 29; Johnson *v.* Way, 27 Ohio St. 374; Spreeves *v.* Allen, 79 Ill. 553; Comstock *v.* Hannah, 76 Ill. 530; Murray *v.* Beckwith, 81 Ill. 43; Edwards *v.* Thomas, 66 Mo. 483; Gage *v.* Sharp, 24 Iowa, 19; Lake *v.* Reed, 29 Iowa, 258; Pond *v.* Waterloo Ag. Works, 50 Iowa, 600; Kelley *v.* Whitney, 45 Wis. 110. But see Skidmore *v.* Clark, 47 Conn. 20, in respect to the purchaser's suspicions being evidence of knowledge of fraud.

value to the commercial world. That this is the feeling of merchants and bankers is fully attested by the fact that Lord Kenyon's ruling is now followed in all the great commercial States of the Union.[1]

[1] The following is a valuable criticism of the two opposing doctrines, made by Beasley, C. J., in Hamilton *v.* Vought, 34 N. J. L. 187: "From this brief review of the cases, I think it may be safely said that the doctrine introduced by Lord Tenterden stands, at the present moment, marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect — a great defect, as I think — was, that it provided nothing like a criterion on which a verdict was to be based. The rule was, that to defeat the note, circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry; and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred. Thus the subject has passed from the indefinite to the comparatively tangible. From a mere matter of fact, the question, to some extent, has become one of law. I cannot doubt, when we recollect that inquiries of this nature always attend that class of cases where judgments are sought against innocent and unfortunate parties, that the change is most beneficial. All experience has shown how hard it is to prevent juries from seizing on the slightest circumstance to avoid giving a verdict against the maker of a note which had been obtained by fraud or theft. To preserve the negotiability of commercial paper and guard the interests of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be obtained.

§ 290. **Valuable consideration must be paid by bona fide holder.** — In order that one may claim to be a *bona fide* holder of a negotiable instrument, he must show that he has paid a valuable consideration for its transfer to him. The language used, in describing the character of the consideration, varies somewhat,[1] but there is a consensus of opinion that it must at least be a substantial, as contrasted with a nominal, consideration. It must have value. It is hardly necessary to say that the so-called *good* consideration, natural love and affection, is not sufficient to make the purchaser of a negotiable instrument a *bona fide* holder.

But a substantial consideration may be less than the face value of a commercial instrument, and yet not be less than its market value. It is not an unfrequent occurrence, that such an instrument is sold on the market for less than its face value. The difference between the price paid and the face value gives rise to the consideration of several very difficult questions, arising out of the failure of some courts to appreciate fully that the sale and transfer of a negotiable instrument differs, or should differ, in no respect from the sale and transfer of any other personal property, so far as the price it will bring on the market is concerned, it being neither more nor less than what it is worth on the market. The questions to be discussed in this connection are, —

(1.) What insufficiency of price will give notice of fraud.

(2.) Is an indorsement or transfer usurious, which is made for a sum less than the face value with legal discount.

(3.) What is the amount of recovery against the indorser and maker on such an indorsement.

§ 291. **When price conveys notice of fraud.** — It is said that inadequacy of the price paid for a negotiable paper

[1] See Golsmid *v.* Lewis Co. Bank, 12 Barb. 410; Gould *v.* Segee, 5 Duer, 270.

may be so gross, as to justify the conclusion that the purchaser is charged with notice of a fraudulent or defective title on the part of the vendor. And it has been held that there was constructive notice of fraud or of some other equally effective defense to the paper, where the purchaser paid $125 for a note of $333.33,[1] $50 for a note of $300,[2] $5 for a note of $300.[3] On the other hand, it has been held that the purchaser of a commercial instrument was a holder for value, and hence took it free from equitable defenses, where he paid $100 for a note of $250,[4] $50 for a note of $100,[5] or $1,250 for a note of $2,500.[6]

It is certain that a purely nominal consideration would not make the purchaser a holder for value. And it may be stated with safety, subject to an explanation of terms, that an inadequate price always puts the person upon his inquiry,[7] and may, certainly along with other suspicious circum-

[1] Hunt *v.* Sandford, 6 Yerg. 387.

[2] Gould *v.* Stevens, 43 Vt. 125.

[3] Dewitt *v.* Perkins, 22 Wis. 473. Dixon, C. J.: "The buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of *mala fides*. It is constructive notice of the invalidity of the note in the hands of the seller, such as to put the purchaser upon inquiry, which if he fails to make he acts at his peril." See also Lay *v.* Wissman, 36 Iowa, 305; Coliger *v.* Francis, 58 Tenn. 423; Petty *v.* Hinman, 2 Humph. 102; Holman *v.* Hobson, 8 Humph. 107; Auten *v.* Gruner, 90 Ill. 300.

[4] Phelan *v.* Moss, 67 Pa. St. 59.

[5] Cannon *v.* Canfield, 11 Neb. 506.

[6] Bailey *v.* Smith, 14 Ohio St. 402, Ranney, J.: "There is very little difficulty in saying that the rule does not require the full face of the paper to be paid. No decision to that effect has ever been made, and the strongest expressions customarily used do not import anything more than that the holder must have given for the paper what it was reasonably and fairly worth. To hold otherwise would be to deprive all paper, for any cause not worth its face, of one of the most essential and valuable incidents of negotiability, and most effectually to stop its circulation. A moment's reflection will satisfy any one how deeply and disastrously such a holding would affect the business and commerce of the country."

[7] Auten *v.* Gruner, 90 Ill. 300.

stances, charge him with notice of existing defenses.[1] But every price is not inadequate, which is less than the face value of the instrument purchased. Commercial paper of every kind has its market value, rising above or below par, according to the financial credit of the persons liable on it. Only that price is inadequate which falls below the market value, and if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser had reasonable grounds for suspecting fraud or some other defense to the instrument. Each case must therefore stand on its own merits. One-half the face value may under some circumstances be a grossly inadequate price; while under different circumstances it may be greatly in excess of what the instrument is worth on the market.

§ 292. **Indorsement for less than face value, when usurious.** — As has already been explained,[2] there are statutes in most of the States declaring it to be illegal to exact more than a certain rate of interest for loans of money, and imposing various penalties for a violation of the statute, and in some States declaring the instrument founded on an usurious transaction to be absolutely void, even in the hands of *bona fide* holders.[3] It is clear, if in the original issue of a negotiable instrument a sum of money was loaned at an usurious rate of interest, even though it assumed the form of discount, the transaction would be usurious and the instrument would be void, at least between the original parties. And it does not matter how the transaction might be managed, for the purpose of concealing the usurious character; if the person, who receives the paper by indorsement, knows that the indorser is not a

[1] Chouteau *v.* Allen, 70 Mo. 341.

[2] See *ante*, § 196.

[3] See *ante*, §§ 196, 198.

holder for value, that it is accommodation paper as to him; and the indorsee pays him a price which would be an usurious rate of discount, such a transaction would certainly be in violation of the usury laws, and the indorsee would subject himself to the penalties of those laws.[1] Many authorities, however, maintain that such a transaction is usurious, even though the holder does not know that there is no prior holder for value.[2] But this is certainly in contradiction of the accepted principle in the law of commercial paper, that a purchaser of such a paper has a right to assume that the relation of the parties to each other is just as it is indicated on the face of the paper.[3] Such a person is certainly a *bona*

[1] Veazie Bank *v.* Paulk, 40 Me. 109; Whitworth *v.* Adams, 5 Rand. 333; May *v.* Campbell, 7 Humph. 450; Richardson *v.* Scobee, 10 B. Mon. 12. And if any one else but the payee or last indorsee offers the note for negotiation, that fact in itself is notice to the purchaser that the prior indorsements were for accommodation. Wallace *v.* Branch Bank, 1 Ala. 565; Mauldin *v.* Branch Bank, 2 Ala. 513; Whitworth *v.* Adams, 5 Rand. 411; Overton *v.* Hardin, 6 Cold. 376; Hendrie *v.* Berkowitz, 37 Cal. 113. An accepted bill, when presented by the acceptor, would stand on the same footing with a purchaser, as the note presented by the maker (Saltmarsh *v.* Planters, etc., Bank, 14 Ala. 668; Carlisle *v.* Hill, 16 Ala. 405), but not when presented by the drawer, on the ground that the bill represents a claim by the drawer against the drawee and acceptor, and the transfer of it by the drawer represents not a loan of money, but the sale of an existing debt. Lloyd *v.* Keach, 2 Conn. 175. *Contra*, Lowes *v.* Mazaredo, 1 Stark. (3 E. C. L. R.) 385. See also King *v.* Ridge, 4 Price, 56; copied in 5 Rand. 617; Whitworth *v.* Adams, 5 Rand. 333; Noble *v.* Walker, 17 Ala. 456.

[2] Munn *v.* Commission Co., 15 Johns. 53; Powell *v.* Waters, 17 Johns. 177; *s. c.* 8 Cow. 669; Sweet *v.* Chapman, 14 N. Y. S. C. (7 Hun) 576; Hall *v.* Wilson, 16 Barb. 548; Bossange *v.* Ross, 29 Barb. 576; Williams *v.* Storm, 2 Duer, 52; Catlin *v.* Gunter, 6 Kern. 368; Clark *v.* Loomis, 5 Duer, 468; Eastman *v.* Shaw, 65 N. Y. 522; Van Schaack *v.* Stafford, 12 Pick. 565; Belden *v.* Lamb, 17 Conn. 452; Bock *v.* Lauman, 24 Pa. St. 448; Corcoran *v.* Powers, 6 Ohio St. 19; Fleming *v.* Mulligan, 2 McCord, 173; Simpson *v.* Fullenweider, 12 Ired. L. 335; Cassebeer *v.* Kalbfleisch, 18 N. Y. S. C. (11 Hun) 123.

[3] Hoge *v.* Lansing, 35 N. Y. 136; Central Bank *v.* Hammett, 50 N. Y. 158; Ahern *v.* Goodspeed, 16 N. Y. S. C. (9 Hun) 265

fide holder, if not a holder for value. If the transaction is usurious as to him, it is necessary to hold that the indorsement of commercial paper for a price that would be an usurious discount is in itself usurious, however free from the taint of usury the original transaction may be.

Whether an indorsement is usurious, when made by a *bona fide* holder for a sum, that would be an usurious discount, is variously decided by the courts. A few of the courts maintain that it is an usurious transaction and so far void, that the indorsee gets no title to the instrument, not even the right to sue the maker, and prior indorsers.[1] The *second* view taken of this matter, is that the indorsement is usurious, but it only avoids the liability of the indorser, as a guarantor of the honor of the instrument, and does not interfere with the transfer of the instrument, and therewith the liabilities of the maker and prior indorsers. The indorsement so far as it operates as a transfer of the paper, constitutes a sale and not a loan.[2] This view does

[1] Whitworth *v.* Adams, 5 Rand. 419, Cabell, J., saying: "If the note had passed from the payee to the person who paid the money on a contract of indorsement, by which the payee received for the bill less than its nominal amount, deducting legal interest, I should be decidedly of opinion that the indorsement was usurious and void, on the ground mentioned in Lowes *v.* Mazaredo, 1 Stark. 385; Comyn's Usury, 181, that 'every indorsement is considered in law as a new delivery.'" See Nichols *v.* Pearson, 7 Pet. 103; Lloyd *v.* Scott, 4 Pet. 205.

[2] Ballinger *v.* Edwards, 4 Ired. Eq. 449; Ray *v.* McMillan, 2 Jones L. 227; Bynum *v.* Rogers, 4 Jones L. 399; McElwee *v.* Collins, 4 Dev. & B. 210; Knights *v.* Putnam, 3 Pick. 185, Wilde, J., saying: "It is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser, or that of the indorsee. But I hold further, that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as a transfer of the note, it is an executed contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which being an executory contract, may be avoided. But in no case can an executed contract be set aside on the plea of usury." Collier *v.* Nevill, 3 Dev.

not conflict with what seems to be the universal opinion that it is not usurious for the holder to bargain for the transfer of a negotiable instrument at a price, that would be an illegal rate of discount in the case of a loan, where the title can pass without indorsement. Such a transaction appears to be universally held to be the sale of a chattel, and in no sense a loan.[1] It is also held to be no usurious transaction, if the indorsement is "without recourse."[2] Of course, such a transaction may in fact be an usurious loan, concealed under the form of a sale, and if it be so, the transaction will come under the penalty of the laws against usury.[3] But the usurious character of such a transaction must be proved. It will not be presumed.

The *third* view is that not only does such an indorsement pass the title to the instrument, together with the right to sue all the prior indorsers, but that the indorsement itself is in no sense "a loan or forbearance of money." These authorities hold that the indorsement, so far as it

31, Ruffin, J., saying: "The discounting of a bill or bond and taking the general indorsement of the holder, does *ex vi termini* constitute a loan; and if the rate of discount exceed that fixed by statute, it is a usurious loan. * * * But upon the strength of the authorities, and the opinion heretofore generally received by the country at large and the profession, the court feels constrained to decide that the defendants cannot avail themselves of any intermediate illegality. The bond was available between the obligor and obligees. The former is not privy to the usurious agreement between the latter and the present holder." See, also, Cowles *v.* McVickar, 3 Wis. 725; Armstrong *v.* Gibson, 31 Wis. 61.

[1] Nichols *v.* Pearson, 7 Pet. 109; Freeman *v.* Britton, 2 Har. 209; Cowles *v.* McVickar, 3 Wis. 731; Newman *v.* Williams, 29 Miss. 222. This is likewise the case where the maker's agent negotiates the paper, provided the purchaser does not know of this confidential relation existing between the maker and the person who offers the paper for sale. Gaul *v.* Willis, 26 Pa. St. 261; Whitworth *v.* Adams, 5 Rand. 333; Taylor *v.* Bruce, Gilmer, 42; Gimmi *v.* Cullen, 20 Gratt. 439.

[2] Freeman *v.* Britton, 2 Har. 191; Durant *v.* Banta, 3 Dutch. 630.

[3] Levy *v.* Gadsby, 3 Cranch, 180; Gaither *v.* Farmers', etc., Bank, 7 Pet. 37; Nichols *v.* Pearson, 7 Pet. 108; Newman *v.* Williams, 29 Miss. 212.

imposes upon the indorser the liability of a guarantor of the payment of the paper, is not a loan or forbearance of money within the usury laws, because the obligation is conditional, differing in no respect from the warranty of quality that frequently accompanies the sale of a chattel.[1] There cannot be much doubt as to the correctness of this last view. I do not see how such an indorsement can be considered a loan within the purview of the usury laws; but it must be observed that there is no practical or substantial difference between a loan of money and the sale of any other commodity, except in the character of the commodity itself. A loan of money is just as much a sale and transfer of that article of property, as the sale of a house would be; and neither article would bring any higher price on the market than its market value, *plus* any additional sum that the vendor might ask as a compensation for any risk of non-payment he might run in any particular case. The difficulty of ascertaining the limitations upon the proper application of the usury laws lies in the economical

[1] 1 Daniel's Negot. Inst., § 768: "Loans of money to be returned with excessive interest are plainly contradistinguished from amounts paid for securities which are transferred in the usual course of business by indorsement; and as the statutes against usury are to be strictly construed they do not seem to us to have contemplated commercial transactions of this kind, which partake rather of the nature of sales accompanied by a peculiar and conditional warranty." See to same effect, 1 Parsons' N. & B. 429, 430; Munn *v.* Commission Co., 15 Johns. 44; Cram *v.* Hendricks, 7 Wend. 569; Brown *v.* Mott, 7 Johns. 360; Braman *v.* Hess, 13 Johns. 52; French *v.* Grindley, 15 Me. 163; Lane *v.* Steward, 20 Me. 104; Farmer *v.* Sewall, 16 Me. 456; Brock *v.* Thompson, 1 Bailey (S. C.) L. 329; Hutchins *v.* McCann, 7 Port. 99; Noble *v.* Walker, 32 Ala. 456; Lloyd *v.* Keach, 2 Conn. 175; Nichols *v.* Pearson, 7 Pet. 109; Gaul *v.* Willis, 26 Pa. St. 261; Moore *v.* Baird, 30 Pa. St. 139; Roark *v.* Turner, 29 Ga. 458; Newman *v.* Williams, 29 Miss. 223; State Bank *v.* Coquillard, 6 Ind. 232; Stevenson *v.* Unkefer, 14 Ill. 105; Coge *v.* Palmer, 16 Cal. 158; Brown *v.* Penfield, 36 N. Y. 473; City Bank of New Haven *v.* Perkins, 29 N. Y. 554; National Bank *v.* Green, 33 Iowa, 140; Fowler *v.* Strickland, 107 Mass. 552.

error of such laws. They are attempts to regulate the price of a commodity, instead of leaving it to the operations of the law of supply and demand. Every construction of these laws should be favored, which restricts their sphere of operation.

§ 293. **The amount of recovery against maker and indorser.** — It seems to be generally held in this country, that if the original transaction was not tainted with fraud, the *bona fide* holder can recover the face value of the paper, whatever price he may have paid for its transfer to him. This is uniformly the rule, where a full consideration was paid by the payee.[1] But the authorities are not agreed what should be the amount of recovery, where the instrument is subject to equitable defenses in the hands of the original parties. Some of the cases maintain that the holder can only recover what he paid for the instrument, as it is not the purpose of the principle of negotiability to do more than to indemnify the *bona fide* holder for any loss he may sustain by reason of the avoidance of the maker's obligation.[2] But, on the other hand, there are some emi-

[1] Lee *v.* Pile. 37 Ind. 107.

[2] Huff *v.* Wagner, 63 Barb. 230, Talcott, J.: "The plaintiff had a verdict under the instruction of the court that he was a *bona fide* holder, and was entitled to recover on the note, notwithstanding the fraud practiced by Ferguson in obtaining the note. The special term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value which he has paid. This, I think, is correct. The protection of the holder for value in such cases, as in other cases, where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded, namely, that he has lost nothing by his reliance upon the face of the paper." Todd *v.* Shel-

nent authorities, which maintain that the holder for value is under all circumstances entitled to recover the face value of the maker, whatever defense might be set up against the original payee.[1] Where a holder receives notice before he

bourne, 15 N. Y. S. C. (8 Hun) 512, Daniels, J., quoting many authorities: "These authorities fully sustain that proposition (the one stated above in the text), and they are in no sense in conflict with the rule that allows a recovery for the full amount of paper improperly negotiated when an adequate consideration has been advanced in good faith upon it. The paper derives its vitality wholly from the circumstance that it has been obtained for value without notice by an innocent purchaser. For his protection it is maintained in his hands as a legal obligation. The object of the law is to save him from loss; and to do that a recovery of the amount he may have advanced is all that can be required. To go beyond it would be inequitable and unjust to the party after that, entitled to be protected from unnecessary loss." See also to same effect, Edwards *v.* Jones, 7 C. & P. 633; *s. c.* 2 M. & W. 413; Jones *v.* Hibbard, 2 Stark. 204; Wiffer *v.* Roberts, 1 Esp. 261; Simpson *v.* Clark, 2 C. M. & R. 342; Stoddard *v.* Kimball, 6 Cush. 469; Chicopee Bank *v.* Chapin, 8 Met. 40; Hubbard *v.* Chapin, 2 Allen, 328; Williams *v.* Smith, 2 Hill, 301; Gordon *v.* Boppe, 55 N. Y. 665; Brown *v.* Mott 7 Johns. 361; Clark *v.* Sisson, 22 N. Y. 312; Bossange *v.* Ross, 29 Barb. 576; Holcomb *v.* Wyckoff, 6 Vroom, 35; Allaire *v.* Hartshorne, 1 Zab. 665; Duncan *v.* Gilbert, 5 Dutch. 527; Bethune *v.* McCrary, 8 Ga. 114; Exchange Bank *v.* Butner, 60 Ga. 654; Grant *v.* Kidwell, 30 Mo. 455; Petty *v.* Hannum, 2 Humph. 102; Holeman *v.* Hobson, 8 Humph. 127; Bailey *v.* Smith, 14 Ohio St. 402; DeWitt *v.* Perkins, 22 Wis. 473; Colliger *v.* Francis, 2 Baxt. 422.

[1] Lay *v.* Wissman, 36 Iowa, 305, Day, J.; "The defense that a note has been obtained fraudulently, or without consideration, does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense does avail, for without such defense he would recover the amount evidenced by the note." Winters *v.* Peck, 14 Mich. 296; Campbell, J.: "The maker of a note has no concern with the amount paid for it by a *bona fide* holder." Smith *v.* Hiscock, 14 Me. 449; Schoen *v.* Haughton, 50 Cal. 528; R. R. Companies *v.* Schulte, 103 U. S. 118, 145; Cromwell *v.* County of Sac, 96 U. S. 60, Field, J.: "The plaintiff, therefore, holds the bonds and the subsequent coupons as his vendor held them, freed from all infirmities attending their original issue. Nor is he limited in his recovery upon them, or upon the other two bonds, as contended by counsel for the county, to the amount he paid his vendor. Clark had given full value for those he purchased, and could have recovered their amount from the

has paid over the consideration in whole or in part, he is a *bona fide* holder only to the amount he had already paid, and not to the amount which he paid out afterwards.[1]

The authorities also differ as to the amount of the recovery, where the primary obligor signed as an accommodation, instead of for value, and that fact is known to the indorsee who pays less than the face value. It is held by some authorities that the indorsee can only recover the amount he paid for the paper.[2] But there are other au-

county, and his right passed to his vendee. But independently of the fact of such full payment, we are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par, and the next below it, and often passing within short periods from one-half of their nominal value to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect infringes upon the doctrine that one who makes only a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured.

[1] Dresser *v.* Mo., etc., R. R. Co., 93 U. S. 95; Hubbard *v.* Chapin, 2 Allen, 328; Lay *v.* Wissman, 36 Iowa, 309; Crandall *v.* Vickery, 45 Barb. 156.

[2] Wiffen *v.* Roberts, 1 Esp. 261, Lord Kenyon, C. J.: "Where a bill of exchange is given for money really due from the drawee to the drawer, or is drawn in the regular course of business in such case the indorsee, though he has not given to the indorser the full amount of the bill, yet he may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the indorsee; but where the bill is an accommodation one, and that known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has

thorities which recognize the right of the holder to recover of an accommodation party the face value, whatever amount he might have paid for it, although his right to recover more than the price paid is denied where the original transaction was illegal or fraudulent.[1]

As has been already explained,[2] in many of the States, it is held that an indorsement for a sum, so far less than the face value as to make the discount excessive of that allowed by the usury laws, is usurious, and renders void the liability of the indorser as a guarantor. But in most of the States, the transaction is held to be not usurious, and that the indorser is liable on his indorsement. But these courts are not agreed as to the amount of recovery against the indorser where the indorsee pays less than the face value. Some of these courts, while maintaining that an indorsement for less than the face value enables the indorsee to recover the whole amount of the maker, acceptor, and prior indorsers, he can only recover of the immediate indorser the actual consideration that passed between the

actually paid for the bill; and if the plaintiff in this case was entitled to recover, he could only do it to the amount of £29, the sum he really paid for it." See also Jones *v.* Hibbert, 2 Stark. 271; Holcomb *v.* Wyckoff, 35 N. J. L. 38; Allaire *v.* Hartshorne; 1 Zab. 665; Stoddard *v.* Kimball, 6 Cush. 469.

[1] Daniels *v.* Wilson, 21 Minn. 530, Berry, J.: "The familiar general rule is that an indorsee of negotiable paper, for value, before maturity, without notice of any infirmity, takes it clear of all equities and defenses between antecedent parties, and is, of course, entitled to full amount of the same, according to its tenor. When the original consideration of the paper is illegal or fraudulent, or it is taken as collateral security, and perhaps in some other instances, an exception to this rule has been recognized, so as to restrict the right of recovery to the consideration actually paid by the indorsee, or to the amount of the debt, to which the paper is collateral. The defendant contends for a like exception in this case, in which it appears that the note was without consideration, and the plaintiff purchased it for less than its face. But in our opinion no such exception is admissible upon principle."

[2] See *ante*, § 292.

parties.[1] But, on the other hand, it is held by some other courts, that the whole amount can be recovered of the indorser, whatever may have been the price he was paid for the transfer and indorsement of the paper.[2]

§ 294. **Usual course of business.** — In order that a *bona fide* holder may claim protection against defenses, not appearing on the face of commercial paper, it is said that he must have acquired it in the "usual course of business." This phrase is said to mean "according to the usages and customs of commercial transactions."[3] When

[1] Munn *v.* Commission Co., 15 Johns. 44, Spencer J.: "The drawer and acceptor in a suit by the indorsee have nothing to do with the consideration paid for the bill by such indorsee to the drawer. They are bound to pay the bill; but as respects the payee and first indorsee, if he be sued by his immediate indorsee it will be competent for him to show the real consideration paid; and if it be less than the face of the bill and the legal interest for the time the bill had to run, then he can claim to have the difference deducted." Ingalls *v.* Lee, 9 Barb. 650, Parker, J.: "It is now settled that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note with interest; though he may recover the full amount of the note against the maker. Whether the rule thus limiting the recovery would apply to third persons who indorse for the accommodation of the payee, and who are not parties to the transfer, has not been decided. * * * I think the rule referred to applies only as between the parties to the sale, and rests upon the consideration of recovering back the consideration paid." See also, to the same effect, Cobb *v.* Titus, 13 Barb. 47; Cram *v.* Hendricks, 7 Wend. 569; Brown *v.* Mott, 7 Johns. 360; Braman *v.* Hess, 13 Johns. 52; Huff *v.* Wagner, 63 Barb. 215; Harger *v.* Wilson, 63 Barb. 237; French *v.* Grindle, 15 Me. 163; Farmer *v.* Lewall, 16 Me. 456; Lane *v.* Steward, 20 Me. 104; Brock *v.* Thompson, 1 Bailey L. 329; Hutchins *v.* McCann, 7 Port. 99; Noble *v.* Walker, 32 Ala. 456; Stevenson *v.* Unkefer, 14 Ill. 105; Cage *v.* Palmer, 16 Cal. 158; Mazuzan *v.* Mead, 21 Wend. 285.

[2] Lloyd *v.* Keach, 2 Conn. 175; Durant *v.* Banta, 3 Dutch. 624; Gaul *v.* Willis, 26 Pa. St. 261; Moore *v.* Baird, 30 Pa. St. 139; State Bank *v.* Coquillard, 6 Ind. 232; Roark *v.* Turner, 29 Ga. 458; National Bank of Michigan *v.* Green, 33 Iowa, 141; Newman *v.* Williams, 29 Miss. 223. See Nichols *v.* Pearson, 7 Pet. 109.

[3] Kellogg *v.* Curtis, 69 Me. 212, Peters, J.: "The purchase by an

inquiry is made after the details of the question, what is the meaning of these terms, it is ascertained that there is some doubt as to the limits of their meaning.[1] It was once doubted, but now definitely settled, that a transfer in settlement of a pre-existing debt was a transaction that occurs "in the usual course of business."[2] Receivers, assignees in bankruptcy and under the insolvent laws, as well as assignees for the benefit of creditors, are held not to receive negotiable paper, "in the usual course of business."[3] In Iowa, it is held that under a statute, authorizing a sale of commercial paper under execution, the transfer by the indorsement of the sheriff was in the usual course of

indorsee must be 'in the usual course of business.' These words are usually defined to mean 'according to the usages and customs of commercial transactions.' If the plaintiff purchased the note before maturity for value, that would be such a transaction."

[1] For the application of the question to pledges, see *post*, § 304.

[2] Swift *v.* Tyson, 16 Pet. 1; Bank of St. Albans *v.* Gilliand, 23 Wend. 31; Bank of Sandusky *v.* Scoville, 24 Wend. 115; Youngs *v.* Lee, 18 Barb. 187; Schepp *v.* Carpenter, 51 N. Y. 602; Bertrand *v.* Barkman, 8 Eng. 150; Robinson *v.* Lair, 31 Iowa, 9; Henry *v.* Ritenour, 31 Ind. 136.

[3] Billings *v.* Collins, 44 Me. 271; Litchfield Bank *v.* Peck, 29 Conn. 384; Briggs *v.* Merrill, 58 Barb. 379. In Roberts *v.* Hall, 37 Conn. 205, a note was obtained from the maker by fraud, and was transferred by the payee to a trustee in part for the benefit of certain creditors, and the balance for the payee's wife. It was held that the trustee did not obtain the paper "in the usual course of business," Carpenter, J., saying: "The purpose for which the paper is used is exceptional and unusual. We apprehend that cases like this are rarely to be met with in business circles. Let us examine it more carefully. A man has a piece of negotiable paper, with which he wishes to pay or secure certain debts. If there is but one debt, he can transfer it directly to the creditor, and the law protects the transaction. This is according to the usual course of business. But if he transfers it to a friend, to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation. Unless some good reason can be shown for such a proceeding, the law ought not to protect it. But it is said there were several creditors, which, it is claimed, sufficiently explains the fact, that the security was affected through the intervention of a trustee."

business.[1] It also depends upon the relation of the transferrer to the paper, whether the transfer is made "in the usual course of business." If the paper is transferred by any one but the payee or last indorsee, it is not done "in the usual course of business" and the transferree takes it subject to the equities.[2] So, also, where the transferrer or negotiator is the acceptor of a bill, it has been held in New York that he is presumed to have it in his possession, for the purpose of accepting it, or after payment, and hence has not the power to negotiate it even before maturity.[3] But in England and South Carolina it is held that one who purchases a bill from the acceptor is a *bona fide* purchaser, since it is possible for the bill to have been made for the accommodation of the acceptor, and that such a transfer is "in the usual course of business."[4] This would seem to be the

[1] Earhart *v.* Gant, 32 Iowa, 481. The statute referred to (Rev. Stat., § 3272) reads as follows: "Bank bills and other things in action may be levied upon and sold, or appropriated as hereinafter provided, and assignments thereon by the officer shall have the same effect as if made by the defendant, and may be treated as so made."

[2] Gibson *v.* Miller, 29 Mich. 355; Mills *v.* Porter, 11 N. Y. S. C. (4 Hun) 524.

[3] Central Bank *v.* Hammett, 50 N. Y. 158, the court saying: "The possession of a bill or note payable to bearer, or indorsed in blank, by one not a party to the instrument, is presumptive evidence of ownership. But a possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself. The actual relations of the several parties to the instrument are presumed to be precisely such as the law declares, in the absence of any special circumstances to take the instrument out of the general rule, and vary the liabilities of the parties as between each other. An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as all the liabilities of all the parties, is precisely that indicated by the instrument; that is, he can not assume that the person in possession has any other or different rights; or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument."

[4] Morely *v.* Culverwell, 7 M. & W. 174; Witte *v.* Williams, 8 S. C. 304.

sounder rule, and in consonance with the ruling that the negotiation of a bill by the drawer, when it is drawn to his order, is in the usual course of business. This decision is based upon the doctrine that the drawer is the original creditor.[1]

§ 295. **Before and after maturity.** — It is also required of the *bona fide* holder, that he must have acquired the paper before maturity, in order to be able to claim exemption from the equitable defenses that may be set up against his indorser or transferrer. If the holder has received the paper, after it has fallen due, he must be considered as having knowledge of at least a technical dishonor. The paper is due and payable, and if the holder of it at maturity offers it for sale, instead of presenting it for payment, this is sufficiently unusual to put the purchaser on his inquiry. It is the universal rule that the commercial paper ceases to be negotiable when due, and can afterwards be only assigned, *i.e.*, transferred, without giving to the transferee any better title than his transferrer had.[2]

[1] Merritt *v.* Duncan, 7 Heisk. 156.

[2] Chief Justice Shaw said in Fisher *v.* Leland, 4 Cush. 456: "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation? Why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defense which might be made if the suit were brought by the indorser." See also Texas *v.* Hardenberg, 10 Wall. 58; Hinckley *v.* Union P. R. R. Co., 129 Mass, 61; Marsh *v.* Marshall, 53 Pa. St. 396; Greenwell *v.* Haydon, 78 Ky. 333; Kellogg *v.* Schnaake, 56 Mo. 137; Arents *v.* Commonwealth, 18 Gratt. 750; Davis *v.* Miller, 14 Gratt. 1; Goodson *v.* Johnson, 35 Tex. 622; Henderson *v.* Case, 31 La. Ann. 215; Kittle *v.* DeLamater, 3 Neb. 325; Clark *v.* Dederick, 31 Md. 148; Darling *v.* Osborne, 51 Vt. 130; Livermore *v.* Blood, 40 Mo. 48; Barker *v.* Valentine, 10 Gray, 341; Flint *v.* Flint, 6 Allen, 34; Simpson *v.* Hall, 47 Conn. 418; Williamson *v.* Doby, 36 Ark. 689; Thomas *v.* Kinsey, 8 Ga. 421; Fields *v.* Tunston, 1 Cold. 40;

The indorsee of overdue paper does not however take the paper subject to all the defenses that might be set up against his transferees, or against the original parties. He takes it subject to the defense —*first*, that the paper had its inception in some fraud or illegality, or was otherwise tainted with some material defect, which rendered it void, except in the hands of a *bona fide* holder;[1] and *secondly*, that the paper was without consideration, or that there had been a payment, or an accord and satisfaction, or that the title of his immediate indorser was defective on account of some equitable defense arising against him.[2]

It can also be shown against the indorsee of overdue paper that he claims title through a thief or finder or from a bankrupt.[3] But, on the other hand, he cannot be prevented from recovering on the instrument, on account of equities arising between remote indorsers and indorsees. He is only subject to those equities which arise between the original parties and between himself and his immediate indorser.[4]

Diamond *v.* Harris, 33 Tex. 634; Scott *v.* First Nat. Bank, 71 Ind. 319; Murray *v.* Lardner, 2 Wall. 110; Smith *v.* Foley, 6 Wall. 492; Merrick *v.* Butler, 2 Lans. 103; Brainard *v.* Reavis, 2 Mo. App. 490.

[1] Bissell *v.* Gowdy, 31 Conn. 47; Southard *v.* Porter, 43 N. H. 379; Renwick *v.* Williams, 2 Md. 356; Eversole *v.* Maull, 50 Md. 103; McLain *v.* Lohr, 25 Ill. 507; Capps *v.* Gorham, 14 Ill. 198; Bates *v.* Kemp, 12 Iowa, 99; Barlow *v.* Scott, 12 Iowa, 63; Kurz *v.* Holbrook, 13 Iowa, 562; Schuster *v.* Marden, 34 Iowa, 181; Green *v.* Louthair, 49 Ind. 139; Cavenah *v.* Somerville, Dallam, (Texas), 534; Coghlan *v.* May, 17 Cal. 515; Thomas *v.* Kinsey, 8 Ga. 421.

[2] Taylor *v.* Mather, 3 T. R. 83, Boehn *v.* Sterling, T. R. 423; Brown *v.* Turner, 7 T. R. 630; Lazarus *v.* Cowie, 3 Q. B. (43 E. C. L. R.) 459; Shipp *v.* Stacker, 8 Mo. 145; Kellogg *v.* Schnaake, 56 Mo. 136; Butler *v.* Munson, 18 La. Ann. 363; Davis *v.* Bradley, 26 La Ann. 555; Bryan *v.* Promm, 1 Ill 33; Stafford *v.* Fargo, 35 Ill. 481; Sawyer *v.* Hoovey, 5 La. Ann. 153; Whitewell *v.* Crehore, 8 La. 540; Diamond *v.* Harris, 33 Tex. 634; Gordon *v.* Wansey, 21 Cal. 77; Elgin *v.* Hill, 27 Cal. 372.

[3] Ashurts *v* Royal Band, 27 Law Times, 168.

[4] Hill *v* Shields, 81 N. C. 250; Hibernian Bank *v.* Everman, 52 Miss. 500; Duke *v.* Clark, 58 Miss. 466; Crosby *v.* Tanner, 40 Iowa, 136. See

The indorsee of overdue paper is also not subject to any equity arising against the indorser after the transfer,[1] or to any set-off arising out of collateral matters.[2]

In England and in some of the United States, it is held that the want of consideration in accommodation paper does not constitute a defense to an action by an indorsee after maturity ;[3] and it is also held that the knowledge of the indorsee does not invalidate the paper, since a man lends his

Warren *v.* Haight, 65 N. Y. 171. It has been held in England, that if the equity is attached directly to the bill or note, it may be set up against a subsequent indorsee of overdue paper, provided no *bona fide* holder intervenes. In re European Bank, Ex parte Oriental Commercial Bank, 5 Ch. Ap. 358.

[1] Baxter *v.* Little, 6 Met. 7; Gutwellig *v.* Stumes, 47 Wis. 428; Fields *v.* Tanston, 1 Cold. 40; Heywood *v.* Stearns, 39 Cal. 58.

[2] Burrough *v.* Moss, 10 B. & C. (21 E. C. L. R.) 558; Whitehead *v.* Walker, 9 M. & W. 506; Oulds *v.* Harrison, 10 Exch. 572; Stein *v.* Yglesias, 1 Cromp. M. & R. 565; 3 Dowl. 252; Holmes *v.* Kidd, 3 Hurlst. & N. 891; Simpson *v.* Hall, 47 Conn. 418; Button *v.* Bishop, 11 Vt. 70; Baxter *v.* Little, 6 Met. 7; Barker *v.* Valentine 10 Gray, 341; Flint *v.* Flint, 6 Allen, 34; Eversole *v.* Maull, 50 Md. 96, Davis *v.* Miller, 14 Gratt. 8; Woods *v.* Viosca, 26 La. Ann. 716; Annon *v.* Houck, 4 Gill, 332; Wilkinson *v.* Jeffers, 30 Ga. 153; Elliott *v.* Deason, 64 Ga. 63; Hauessler *v.* Greene, 8 Mo. App. 451; Gullett *v.* Hay, 15 Mo. 399; Arnot *v.* Woodburn, 35 Mo. 29; Hughes *v.* Large, 2 Barr. 103; Epler *v.* Fauk, 8 Barr. 468; Clay *v.* Cottrell, 6 Harris, 413; Barlow *v.* Scott, 12 Iowa, 63; Bates *v.* Kemp, 12 Iowa, 99; Way *v.* Lamb, 15 Iowa, 79; Richards *v.* Daily, 34 Iowa, 427; Whitaker *v.* Kuhn, 52 Iowa, 315; Trafford *v.* Hall, 7 R. I. 104. But see *contra*, Edwards on Bills, 260; Driggs *v.* Rockwell, 11 Wend. 504; Odiorne *v.* Woodman, 39 N. H. 544; Davis *v.* Neligh, 7 Neb 78; also, in consequence of a statute, *contra*, Denning *v.* Gibson, 53 Iowa, 517. It has been held to be impossible to set up the defense of set-off against an indorsee after maturity, even though the indorsement was made for the purpose of defeating the set-off. Oulds *v.* Harrison, 10 Exch. 572; 24 L. J. Exch. 66; Heuessler *v.* Greene, 8 Mo. App 454.

[3] Charles *v.* Marsden, 1 Taunt. 224; Stein *v.* Yglesias, 3 Dowl. 252; Caruthers *v.* West, 11 Q. B. (63 E. C. L. R.) 143; Sturtevant *v.* Ford, 4 M. & G. 101; Dunn *v.* Weston, 71 Me. 270; First Nat. Bank *v.* Grant, 71 Me. 374; and many early cases in New York, now overruled; Brown *v.* Mott, 7 Johns. 224; Harrington *v.* Dorr, 3 Rob 275; Powell *v.* Waters, 17 Johns. 176; Grandon *v.* Lerov, 2 Paige, 509.

credit always with the intention of being bound by his promise.[1] But where the parties have agreed not to negotiate an accommodation bill after maturity, then it cannot be enforced by an indorsee after maturity.[2] But it is held in most of the States in this country, that it is not to be presumed that the accommodating party intended to lend his credit to be used at any time, but rather that he authorized its use only before the maturity of the paper which he signed; and in consequence the indorsee of overdue accommodation paper cannot recover on it.[3]

At every point in this inquiry, it must be always kept in mind not only that the transferee of overdue paper does not get a better title than his transferrer, but also that he gets whatever title the transferrer has. If the transferrer is a *bona fide* holder without notice of defenses, the transferee after maturity can stand upon the good faith of his transferrer, and enjoy the benefit of his superior title. The principal reason for this rule, apart from the fact that a grantor always conveys whatever title he has, is that it alone enables the *bona fide* holder to derive full benefit from his superior title. If he could not transfer it, he could only enforce it against the prior parties.[4] But this

[1] Charles *v.* Marsden, 1 Taunt. 224, Lawrence, J.: "Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it was due? For there is no reason why a bill may not be negotiated after it is due, *unless there was an agreement for the purpose of restraining it.*"

[2] Charles *v.* Marsden, 1 Taunt. 224 (*semble*); Parr *v.* Jewell, 16 C. B. 684. See Caruthers *v.* West, 11 Q. B. (63 E. C. L. R.) 143.

[3] Chester *v.* Dorr, 41 N. Y. 279 (overruling prior decision); Bower *v.* Hastings, 12 Casey, 285; Hoffman *v.* Foster, 43 Pa. St. 137; Carroll *v.* Peters, 1 McGloin (La.), 88; Battle *v.* Weenes, 44 Ala. 105.

[4] Smith *v.* Hiscock, 14 Me. 449; Woodman *v.* Churchill, 52 Me. 58; Roberts *v.* Lane, 64 Me. 108; Thompson *v.* Shepherd, 12 Met. 311; Bissell *v.* Gowdy, 31 Conn. 48; Fairclough *v.* Pavia, 9 Exch. 690; Chalmers *v.*

rule is subject to this exception, that if the note were invalid in the hands of the payee or some prior indorser, he could not, by securing a retransfer of the instrument by a subsequent *bona fide* indorsee, claim the benefit of the superior title of this subsequent indorsee.[1]

§ 296. **Instruments payable on demand, or at sight, when overdue.** — Instruments, which are made payable on demand, or at sight, may become due immediately by demand of payment,[2] or by payment by the maker.[3] Not

Lanion, 1 Camp. 383; Wilson *v.* Mechanics' Sav. Bank, 45 Pa. St. 494; Riegel *v.* Cunningham, 9 Phila. 177; Bassett *v.* Avery, 15 Ohio St. 299; Lock *v.* Talford, 52 Ill. 166; Bradley *v.* Marshall, 54 Ill. 173; Richert *v.* Koerner, 54 Ill. 306; Peabody *v.* Rees, 18 Iowa, 171; Howell *v.* Crane, 12 La. Ann. 126; Commissioners *v.* Clark, 94 U. S. 285; Cromwell *v.* County of Lac, 96 U. S. 51; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181; Cook *v.* Larkin, 10 La. Ann. 507; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380; Prentice *v.* Zane, 2 Gratt. 262; Kinney *v.* Kruse, 28 Wis. 190; Watson *v.* Flanagan, 14 Tex. 354; Cotton *v.* Sterling, 20 La. Ann. 282; Simonds *v.* Merritt, 33 Iowa, 537; Mornyer *v.* Cooper, 35 Iowa, 257; Hascall *v.* Whitmore, 19 Me. 102; Riley *v.* Scahwhacker, 50 Ind. 592; Woodworth *v.* Huntoon 40 Ill. 131; Hogan *v.* Moord, 48 Ga. 156; Boyd *v.* McCann, 10 Md. 118.

[1] Tod *v* Wick, 36 Ohio St. 387; Sawyer *v.* Allen, 9 Allen, 42; Boit *v.* Whitehead 50 Ga. 76; Kost *v.* Bender, 25 Mich. 516, Cooley, J.: "I am not aware that this rule has ever been applied to a purchaser by the original payee, nor can I perceive that it is essential to the protection of the innocent indorsee, that it should be. It cannot be very important to him, that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community, the market value of his security is not likely to be affected by the circumstance that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor do I perceive that any rule or principle of law would be violated by permitting the maker to set up this defense against the payee, when he becomes indorsee, with the same effect as he might have done before it had been sold at all, or that there is any valid reason against it."

[2] Hill *v.* Henry, 17 Ohio 1; Darling *v.* Wooster, 9 Ohio, St. 519; Hirst *v.* Brooks, 50 Barb. 534.

[3] Stover *v.* Hamilton, 21 Gratt. 273. If partial payment is made, de-

only is that true, where the paper is expressed to be payable "on demand" or "at sight," but also, where different expressions, but of similar import, are used; as, for example, "at any time called for,"[1] "in such portions and at such times, as the directors may require,"[2] etc. And a paper is held payable on demand, whenever the time of payment is not expressed therein.[3]

It was formerly held that a bill or note, payable on demand, or at sight, was never overdue, so as to let in the equities, until there had been a demand.[4] But the better and more modern rule is, that the demand must be made within a reasonable time after the date of the note, in order to claim the rights of a *bona fide* holder. And if the bill or note is transferred within a reasonable time, the transferee is not charged with constructive notice of the actual dishonor of the paper.[5] It has been held that what is reasonable time, in this connection, is a question for the court to determine.[6] It has also been held to be a question of fact for the jury,[7] and also, a mixed question of fact and

mand will be presumed, and the paper becomes overdue. Bayliss *v.* Pearson, 15 Iowa 279.

[1] Bowman *v.* McChesney, 22 Gratt. 609.

[2] Colgate *v.* Buckingham, 39 Barb. 177; Howland *v.* Edmonds, 24 N. Y. 307.

[3] Thrall *v.* Mead, 40 Vt. 540; Keyes *v.* Fenstermacher, 24 Cal. 329; Cornell *v.* Moulton, 3 Denio, 12; First Nat. Bank *v.* Price, 52 Iowa, 570; Mason *v.* Patton, 1 Mo. 279; Dodd *v.* Denny, 6 Oreg. 156; Jones *v.* Brown, 11 Ohio St. 601; Burthe *v.* Donaldson, 15 La. 482; Freeman *v.* Ross, 15 Ga. 252.

[4] Brooks *v.* Mitchell, 9 M. & W. 15, Parke, B., saying: "A promissory note payable on demand is intended to be a continuing security; it is quite unlike a check which is intended to be presented immediately." See also Barough *v.* White, 4 B. & C. 325; Lea *v.* Glover, 1 Bradw. 335; Gordon *v.* Preston, Wright (Ohio), 341.

[5] Poorman *v.* Mills, 39 Cal. 345; 1 Daniel's Negot. Inst. 734; Thrall *v.* Mead, 40 Vt. 540; Works *v.* Hershey, 35 Iowa, 340.

[6] Sice *v.* Cunnigham, 1 Cow. 397; Carll *v.* Brown, 2 Mich. 401; Poorman *v.* Mills, 39 Cal. 345; Sylvester *v.* Crapo, 15 Pick. 92.

[7] Barbour *v.* Fullerton, 36 Pa. St. 105.

law.[1] Probably, under varying circumstances, each of these propositions will find application.

The most difficult thing to determine is, what constitutes a reasonable time, and by what circumstances may it be ascertained. No general rule can be laid down. The shorter or greater length of time is not a reliable guide. For, under varying circumstances, bills and notes have been held to be overdue, which had been running for two months,[2] two months and a half,[3] three months,[4] four months,[5] five months,[6] six months,[7] ten months,[8] eleven months,[9] thirteen months,[10] fourteen months,[11] eighteen months,[12] two years,[13] three years,[14] six years.[15] On the other hand, such bills and notes have been held to be still negotiable, where they had been transferred two days,[16] five days,[17] seven days,[18] twenty-three days,[19] twenty-five days,[20] several

[1] Salmon *v.* Grosvenor, 66 Barb. 160.

[2] Camp *v.* Clark, 14 Vt. 387.

[3] Losee *v.* Dunkirk, 7 Johns. 70.

[4] Herrick *v.* Woolverton, 41 N. Y. 581.

[5] Chamberlain *v.* Delarive, 2 Wils. 353.

[6] Bull *v.* First Nat. Bank, 14 Fed. Rep. 612; LaDue *v.* First Nat. Bank, 31 Minn. 33.

[7] American Bank *v.* Jenness, 2 Met. 288; Ayer *v.* Hutchins, 4 Mass. 370; Carlton *v.* Bailey, 27 N. H. 230; Nevins *v.* Townsend, 6 Conn. 5.

[8] Emerson *v.* Crocker, 5 N. H. 159; Morey *v.* Wakefield, 41 Vt. 24.

[9] Sylvester *v.* Crapo, 15 Pick. 92.

[10] Cross *v.* Brown, 51 N. H. 486.

[11] Atlantic Delaine Co. *v.* Tredick, 5 R. I. 171; Cromwell *v.* Abbott, 1 Serg & R. 180.

[12] Furman *v.* Haskins, 2 Cai. 369.

[13] Niver *v.* Best, 10 Barb. 369.

[14] Merritt *v.* Todd, 23 N. Y. 28.

[15] Gregg *v.* Union, etc., Nat. Bank, 87 Ind. 238.

[16] Dennett *v.* Wyman, 13 Vt. 485; Howe *v.* Hartness, 11 Ohio St. 449.

[17] Stewart *v.* Smith, 28 Ill. 396.

[18] Thurston *v.* M'Kown, 6 Mass. 428; Seaver *v.* Lincoln, 21 Pick. 267.

[19] Mitchell *v.* Catchings, 23 Fed. Rep. 710.

[20] Carll *v.* Brown, 2 Mich. 401.

weeks,[1] two months,[2] five months,[3] nine months,[4] ten months,[5] two years,[6] after date. In every case the conclusion depends upon the circumstances. If it appears from these circumstances that the parties intended the paper to be a continuing security, a greater length of time will be considered reasonable, than where the circumstances indicated the expectation of prompt payment. The reservation of interest always tends to prove that the paper was intended to remain negotiable for a considerable time, and the length of time will vary with the length of the periods of interest.

In many States, it is now provided by statute that bills and notes on demand shall be overdue after a certain period and not before.[7] But in Connecticut, and presumably in the other States, the statute does not affect the question of maturity as between the original parties.[8] In California, the promissory note is declared by statute to be overdue in one year, if it bears interest, and in six months, if it does not bear interest.[9] The bill of exchange is overdue in one year, if it bears interest, and ten days if without interest.[10]

§ 297. **Transfer when installment of principal or interest is overdue.** — If the principal of the paper is payable

[1] Wethy *v.* Andrews, 3 Hill, 582.

[2] McLean *v.* Nichlen, 3 V. L. R. 107.

[3] Sice *v.* Cunningham, 1 Cow. 397; Sanford *v.* Mickles, 4 Johns. 224.

[4] Castle *v.* Candee, 16 Conn. 224.

[5] Chartered Mercantile Bank *v.* Dickson, L. R. 3 P. C. 574.

[6] Tomlinson Carriage Co. *v.* Kinsella, 31 Conn. 268; Ranger *v.* Cory, 1 Met. 369.

[7] In Connecticut, four months, G. S. Conn. (1875), 343, § 2. In Massachusetts, New Hampshire, Vermont, and Minnesota, sixty days. Mass. P. S. (1882), ch. 77, § 12; N. H. G. L. (1878), 509, § 11; Vt. R. L. (1880), § 2013; Minn. G. S. (1878), ch. 23, §§ 11, 12.

[8] Seymour *v.* Continental Life Ins. Co., 44 Conn. 300.

[9] California Codes & Stats. (1881), § 3135.

[10] Cal. Codes and Stat. (1880), § 8099; Dakota R. C. (1877), § 1830; Utah L. (1882), §§ 10, 11.

in installments, the paper is considered as dishonored by the failure to pay any one installment when it fell due, whether the entire debt became due on such a failure to pay or not, and a subsequent transferee takes it subject to all the equities.[1] But it is doubtful whether the same rule applies to the failure to pay an installment of interest, unless the parties have stipulated that the entire debt shall become due on the failure to pay the interest. Although it has been held that the failure to pay the interest will destroy the negotiability of the paper, with or without this stipulation;[2] the better opinion is that, in the absence of such a stipulation, the failure to pay an installment of interest does not affect the future negotiability of the note or bill, for the reason that the interest is a mere incident, and not a part, of the original indebtedness, represented by the instrument. The *bona fide* holder before maturity takes the instrument free from equities, although there are arrears of interest.[3]

§ 298. **Transfer on last day of grace,**— before the close of the hours of business, is said by some of the authorities

[1] Field *v.* Tibbetts, 57 Me. 359; Vinton *v.* King, 4 Allen, 562; Hart *v.* Stickney, 41 Wis. 630.

[2] Newell *v.* Gregg, 51 Barb. 263.

[3] Boss *v.* Hewitt, 15 Wis. 260; Kelley *v.* Whitney, 45 Wis. 110; National Bank of North America *v.* Kirby, 108 Mass. 497, Cole, J., saying: "It is manifest that a failure of interest is not to be ranked with a failure to pay principal. Interest is an incident of the debt, and differs from it in many respects. It is not subject to protest and notice to indorsers, or days of grace according to the law merchant. Interest is not recovered on overdue interest, and the statute of limitations does not run against it until the principal debt is due. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand it, and he has the election to do so, or wait and collect it all with the principal." But see First Nat. Bank *v.* Scott County, 14 Minn. 77; Chouteau *v.* Allen, 70 Mo. 290, 339.

to be a transfer before maturity [1] but the contrary opinion is maintained by equally high authority.[2]

§ 299. **Purchaser without notice.** — The *bona fide* holder must also be a purchaser without notice. If he can be charged with notice of the defense or defect of title, he is not a *bona fide* holder, and cannot claim any better title than what the vendor had.[3]

In order that any notice may affect the holder's title, it must exist at the time when the paper is transferred to him, or at least before he had paid for it. If he receives notice before payment of the price of the note or other commercial paper, he is not a *bona fide* holder, although the paper had been already transferred to him.[4]

But notice to an agent is taken in law to be notice to the principal, so that it is not necessary, in order to bind the principal, that he should have knowledge of the defense or defect of title, if the agent, who is charged with the purchase of the paper, has notice.[5] It is, however, necessary, in order that the principal may be charged with the notice that is given to the agent, that the agent shall acquire the knowledge while he is engaged in the capacity of an

[1] Crosby *v.* Grant, 36 N. H. 273.

[2] Pine *v.* Smith, 11 Gray, 38.

[3] Hanauer *v.* Doane, 12 Wall. 342; Fisher *v.* Leland, 4 Cush. 456; Skilding *v.* Warren, 15 Johns. 270; Kasson *v.* Smith, 8 Wend. 437; Harrisburg Bank *v.* Meyer, 6 Serg. & R. 537; Norvell *v.* Hudgins, 4 Munf. 496; Lenheim *v.* Fay, 27 Mich. 70; Ryland *v.* Brown, 2 Head, 270.

[4] Crandall *v.* Vickery, 45 Barb. 156; Perkins *v.* White, 36 Ohio St. 530. And where he has paid only a part of the sum agreed upon, when he received notice, he is a *bona fide* holder, only as to the amount already paid. Dresser *v.* Mo., etc., R. R. Co., 93 U. S. 93. See Weaver *v.* Barden, 49 N. Y. 286.

[5] Lawrence *v.* Tucker, 7 Greenl. 195; Patten *v.* Merchants' Ins. Co., 40 N. H. 375; Varnum *v.* Milford, 4 McLean, 93; Bank *v.* Whitehead, 10 Watts, 397; Wiley *v.* Knight, 27 Ala. 336; Blum *v.* Loggin, 53 Tex. 137; Livermore *v.* Blood, 40 Mo. 48; Geer *v.* Higgins, 8 Kan. 520. It is the same with a notice to a subagent. Boyd *v.* Vanderkemp, 1 Barb. Ch. 273.

agent.[1] If the notice is received, when the agent is engaged with his own affairs, the principal is not bound by it.[2]

§ 300. **Actual and constructive notice.** — As a matter of course, if the purchaser has received actual notice of the fraud or other defense that might be set up against his transferrer, he cannot claim the protection of a *bona fide* holder.[3] Such cases do not present any difficulty. The difficulties arise when it is undertaken to charge the purchaser with constructive notice when he knows of such facts as would lead an ordinarily prudent man to suspect a defense or other defect of title. This doctrine is based upon the principle that it is a man's duty to do all in his power to prove or disprove any well-grounded suspicion, as to the validity of a negotiable instrument, that might find lodgment in his mind, before he can claim to be a *bona fide* holder.[4] But it is not every suspicion that good faith would require to be investigated. Some of the authorities are inclined to hold that "it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry."[5] In other words, the purchaser can not claim to be a *bona fide* holder, if he is guilty of

[1] The Distilled Spirits, 11 Wall. 366.

[2] Thus, the bank is affected by the knowledge of one of its directors, if he receives a defective paper while acting for the bank. Security Bank *v.* Cushman, 121 Mass. 490. But a director who offers a note, of which he is payee or indorsee, to his bank for sale or discount, if he does not act with the board in that case, is not considered to be in any sense an agent of the bank in that transaction, and the bank will not be charged with his knowledge of the defenses to the note. Hightstown Bank *v.* Christopher, 11 Vroom, 435; Atlantic Bank *v.* Savery, 82 N. Y. 291. See Smith *v.* Ayer, 101 U. S. 320; West Boston Sav. Bank *v.* Thompson, 124 Mass. 506; Barnes *v.* Trenton Gas Co., 12 C. E. Green, 33.

[3] Norvill *v.* Hudgins, 4 Munf. 496; Dogan *v.* Dubois, 2 Rich. Eq. 85.

[4] Angle *v.* N. W., etc., Ins. Co., 92 U. S. 342; Rowland *v.* Fowler, 47 Conn. 347.

[5] Story on Promissory notes, § 197.

gross negligence in not pursuing an inquiry that would, under the circumstances, be suggested to a reasonably prudent man.[1] But the better opinion is that the suspicion must be so well-grounded as to be almost proof of *mala fides;* as it was expressed by the Supreme Court of Missouri, "unless there be such a combination of suspicious incidents as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware at the time of its acquisition of some equity between the original parties thereto," he would not be charged with constructive notice.[2]

If a note is made payable to one as "trustee," and indorsed in the same way by the trustee, the purchaser is charged with constructive notice of the fact that the payee took the paper in a fiduciary capacity, and cannot dispose of it for his own benefit.[3] Although it has been held in some of the States that the statement in a bill or note of the consideration puts the purchaser upon his inquiry whether the consideration named actually passed or has to any extent failed,[4] the great weight of authority is against this view. The authorities generally hold that the purchaser of commercial paper is not burdened with the requirement to see to the execution and full performance of the consideration, merely because he knows what it is.[5] In some States it

[1] Gill *v.* Cubitt, 3 B. & C. 466; Strange *v.* Wigney, 6 Bing. 677.

[2] Horton *v.* Bayne, 52 Mo. 533. See also May *v.* Chapman, 16 M. & W. 355; Hamilton *v.* Vought, 34 N. J L. 187; Edwards *v.* Thomas, 66 Mo. 486; Greenaux *v.* Wheeler, 6 Tex. 526.

[3] Third Nat. Bank *v.* Lange, 51 Md. 138; Shaw *v.* Spencer, 100 Mass. 382. But see Westmoreland *v.* Foster, 60 Ala. 448, to the contrary, the words there being held to be merely *descriptio personæ*.

[4] Rand *v.* State, 77 N. C. 175; Thrall *v.* Horton, 44 Vt. 386. See Harris *v.* Nichols, 26 Ga. 414, as to the effect of knowledge that the consideration was of a doubtful character.

[5] In New York, where the consideration was expressed to be "one knitting machine warranted," the *bona fide* purchaser was held not charged with constructive notice of the breach of a parol warranty,

is required by statute that notes given for patent rights should have that fact stated on their face; but a note is in those States nevertheless good in the hands of a *bona fide* holder, although the note does not contain the required words.[1]

It does not affect the *bona fide* holder's title, if he knows of the maker's death when he purchases the note, unless he knew that it was accommodation paper in the hands of the payee. It will be assumed that he was ignorant of its accommodation character.[2]

Finally, it is not necessary that the purchaser should have notice of the particular defense or defect, in order to be charged with constructive notice. It is sufficient if he has a general notice that there is something wrong with the paper.[3] But if he makes inquiry *bona fide* and to the ex-

Boardman, J., saying: "Giving to the words the broadest meaning possible, they do not imply that there has been a breach of the warranty. They cannot be construed as notice to the purchaser of a defense to the note in the hands of the payee. If they do, it must be because the law will presume a breach whenever there is a warranty. That would be preposterous." Loomis *v.* Moury, 15 N. Y. S. C. 312; Borden *v.* Clark, 26 Mich. 412; Miller *v.* Finley, 26 Mich. 255, where a note was given for a patent right, Campbell, J., saying: "Whatever may have been the experience of our people with itinerant patent vendors, it cannot be properly assumed as a fact that a patent regularly issued by the department lacks either novelty or utility. And as fraud can never be presumed without proof, the jury could not properly be charged upon any theory, supported by no evidence at all." See also to same effect, Patten *v.* Gleason, 106 Mass. 439; Taylor *v.* Curry, 109 Mass. 36; Sackett *v.* Kellar, 22 Ohio St. 554; Davis *v.* McCready, 17 N. Y. 230; Beardslee *v.* Horton, 3 Mich. 560; Croix *v.* Sibbett, 15 Pa. St. 238; Bend *v.* Wietze, 12 Wis. 611; Doherty *v.* Perry, 38 Ind. 15; Hereth *v.* Merchants' Nat. Bank, 34 Ind. 380; Stevenson *v.* O'Neal, 71 Ill. 314; Harris *v.* Nicholls, 26 Ga. 413; Heard *v.* Dubuque Co. Bank, 8 Neb. 16; Bank of Commerce *v.* Barrett, 38 Ga. 126; Kelley *v.* Whitney, 45 Wis. 110.

[1] Haskell *v.* Jones, 86 Pa. St. 173.

[2] Clark *v.* Thayer, 105 Mass. 217.

[3] Boyce *v.* Geyer, 2 Mich. N. P. 71; Studebaker *v.* Man. Co., 70 Mo. 274; Oakley *v.* Ooddeen, 2 F. & F. 659. "General or implicit notice is where the holder had notice that there was *some* illegality or *some* fraud

tent of his ability, without substantiating the general notice of defect, he can claim the protection of a *bona fide* holder.[1]

§ 301. **Constructive notice in respect to accommodation paper.** — Mere knowledge that the instrument is accommodation paper will not prevent the purchaser from becoming a *bona fide* holder of the instrument. The value paid to the party for whose accommodation the instrument was executed and negotiated, is sufficient consideration to bind the accommodation party to the purchaser for value.[2] But where there has been a diversion of the accommodation paper from the purpose and object for which it was issued, knowledge of this diversion by the purchaser will preclude him from being a *bona fide* holder.[3] In New

vitiating the bill, though he may not have been apprised of its precise nature. Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury from circumstances fairly warranting such an inference, that he knew, or believed, or thought, that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy his title." Byles on Bills (Sharswood, 6th ed.) [*122] 195.

[1] Belmont Bank *v.* Hoge, 7 Bosworth, 543. See Roth *v.* Colvin, 32 Vt. 125; Steinhart *v.* Boker, 36 Barb. 284.

[2] Thatcher *v.* West River Nat. Bank, 19 Mich. 202; Charles *v.* Marsden, 1 Taunt. 224; Stephens *v.* Monongahela Nat. Bank, 87 Pa. St. 163, Powell *v.* Waters, 17 Johns. 176; Grant *v.* Ellicott, 7 Wend. 227; Grandin *v.* Leroy, 2 Paige, 509; Mentross *v.* Clark, 2 Sandf. 115; Jones *v.* Berryhill, 25 Iowa, 289; Bank of Ireland *v.* Beresford, 6 Dow. 237; Cronise *v* Kellogg, 20 Ill. 11. And this is also true, where the purchaser takes it after maturity. See *ante*, § 295.

[3] Thompson *v.* Posten, 1 Duvall, 415; Stoddard *v.* Kimball, 6 Cush. 469; Clark *v.* Thayer, 105 Mass. 216; Daggett *v.* Whiting, 35 Conn. 372; Evans *v.* Kymer, 1 B. & Ad. 528; Key *v.* Flint, 8 Taunt. 21; Roberts *v.* Eden, 1 Bos. & P. 398; Buchanan *v.* Findley, 9 B. & C. 738; Small *v.* Smith, 1 Den. 583; Mohawk Bank *v.* Corey, 1 Hill, 513; Gray *v.* Bank of Kentucky, 29 Pa. St. 365; Dunn *v.* Weston, 7 Me. 270; Hidden *v.* Bishop, 5 R. I. 29; Hickerson *v.* Raignell, 2 Heisk. 329, Fetters *v.* Muncie Nat. Bank, 34 Ind. 251.

York, diversion of accommodation paper is so far considered a fraud, as to throw upon the purchaser the burden of proving that he had no notice of the diversion.[1]

But it is not every variation from the instructions of the accommodation indorser that amounts to diversion. If the accommodation party had any interest in the special mode of negotiating the paper, as to where it was to be used in taking up other paper, on which the accommodation party was liable, it would be an unwarrantable diversion, if it were used in paying any other debt, or in affecting any other loan.[2] But, of course, the purchaser must know of the benefit that the accommodation party expects to derive from the negotiation of the paper. Otherwise, he can claim to be a *bona fide* holder.[3] But as long as the diversion is not fraudulent or prejudicial to the accommodation party, the deviation from instructions does not affect the title of the indorsee. If the purpose of the accommodation has been substantially attained, the method or mode of attainment will not be considered objectionable and is certainly not necessarily fraudulent or prejudicial to the accommodation party.[4] Thus, it is not a diversion to negotiate a note at one

[1] Farmers' & Citizens' Nat. Bank *v.* Noxon, 45 N. Y. 762; Spencer *v.* Ballou, 18 N. Y. 331; Schepp *v.* Carpenter, 51 N. Y. 604; Moore *v.* Ryder, 65 N. Y. 439; Comstock *v.* Hier, 73 N. Y. 270; Grocers' Bank *v.* Penfield, 14 N. Y. S. C. (7 Hun) 279; Wardell *v.* Howell, 9 Wend. 170, Sutherland, J., saying: "Where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accomodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration."

[2] Wardell *v.* Howell, 9 Wend. 170; Moore *v.* Ryder, 65 N. Y. 440. In such a case, if the bank or banker refuses to discount the paper, it should be returned to the accommodation party. Kasson *v.* Smith, 8 Wend. 437; Denniston *v.* Bacon, 10 Johns. 198.

[3] Lamb *v.* Rudd, 37 Iowa, 618.

[4] Duncan et al. *v.* Gilbert, 29 N. J. L. 521; Jackson *v.* First Nat. Bank, 42 N. J. L. 178; Wardell *v.* Howell, 9 Wend. 170; Brooks *v.* Hey, 23 Hun,

bank, when the accommodation maker or indorser directed it to be discounted at another bank or with some other person.[1] So, also, is it not a diversion to pay pre-existing debts with accommodation paper given for the purpose of effecting a loan.[2] It is not a diversion where a paper, intended to be discounted, was used as collateral security.[3] Nor can the accommodation party complain, if a note given as a collateral security should be sold by the pledgee in violation of the rights of all prior parties, as long as the purchaser was not aware of this diversion.[4]

§ 302. **Lis pendens — Garnishment and trustee process — Public records.** — If there is nothing on the face of the paper to indicate any defect of title, the constructive notice arising out of a pending suit,[5] or out of the registration

372; Purchase *v.* Mattison, 6 Duer, 87; Briggs *v.* Boyd, 37 Vt. 538. See Schepp *v.* Carpenter, 51 N. Y. 604; Reed *v.* Trentman, 53 Ind. 438.

[1] Mohawk Bank *v.* Corey, 1 Hill, 513; Bank of Chenango *v.* Hyde, 4 Cow. 567; Powell *v.* Walters, 17 Johns. 176.

[2] Quin *v.* Hard, 43 Vt. 375. "The accommodation party must have some interest in the application of the money, otherwise he is not in condition to contend successfully that there has been a misapplication of it, or of the security on which it was to be raised." See also, to same effect, Felters *v.* Muncie Nat. Bank, 34 Ind. 254. But see Farmers', etc., Bank *v.* Hathaway, 36 Vt. 539, in which it is held otherwise where the paper was made payable to the person to whom it was intended to be discounted.

[3] Dunn *v.* Western, 71 Me. 270; De Zeng *v.* Fyfe, 1 Bosw. 336; Robbins *v.* Richardson, 2 Bosw. 253; Rutland Bank *v.* Buck, 5 Wend. 66; Jackson *v.* First Nat. Bank, 42 N. J. L. 178, Kimbro *v.* Lytle, 10 Yerg. 417; Lord *v.* Ocean Bank, 20 Pa. St. 384, Black, C. J., saying: "The maker of an accommodation note cannot set up want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument, for the benefit of his friend, must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way.

[4] Dawson *v.* Goodyear, 43 Conn. 548.

[5] County of Warren *v.* Mavey, 97 U. S. 106; County of Cass *v.* Gillett,

of some lien or mortgage — containing recitals which show equitable defenses — held as a security for the commercial paper,[1] will have no effect upon the title of the purchaser as a *bona fide* holder of the paper, unless the paper was at the time of transfer overdue, when it ceases to be negotiable.[2]

The same principles have been applied to the garnishment and trustee process, when such proceedings were instituted against the maker to compel him to pay the face of the note to a creditor of the payee or other subsequent holder. But although it has been held, under some of the State statutes, that the garnishment can prevail against a *bona fide* holder under the defendant payee of the note, the better opinion is that the maker cannot be compelled to pay the note to the garnisher, unless he can show that the note has not been transferred to a *bona fide* holder.[3]

§ 303. **Burden of proof, as to bona fide ownership.** — It is also an important question in this connection on whom the burden of proof rests, to prove or disprove the fact of *bona fide* ownership. The *bona fide* holder is not subject to equitable defenses so-called. But those defenses may affect his title if he fails to prove his *bona fide* possession when the law throws upon him the burden of proof. It is therefore necessary to state with precision the burden of proof in all its details.

100 U. S. 585; Leitch *v.* Wells, 48 N. Y. 585; Wintons *v.* Westfeldt, 22 Ala. 560; Mayberry *v.* Morris, 62 Ala. 113; Kieffer *v.* Ehler, 18 Pa. St. 388; Hill *v.* Kraft, 29 Pa. St. 186; Day *v.* Zimmerman, 88 Pa. St. 188; Murray *v.* Lylburn, 2 Johns. Ch. 441; Stone *v.* Elliott, 11 Ohio St. 252; Re Great Western Tel. Co., 5 Biss. 363; Durant *v.* Iowa Co., 1 Woolw. 69; Mims *v.* West, 38 Ga. 18.

[1] Minell *v.* Read, 26 Ala. 736.

[2] Mayberry *v.* Morris, 62 Ala. 117; Mills *v.* Stewart, 12 Ala. 96; Kellogg *v.* Fancher, 23 Wis. 21.

[3] See *ante*, § 251.

The possession of the paper by an indorsee or by an assignee, where the paper is payable to bearer or indorsed in blank, is universally held to be *prima facie* proof of *bona fide* ownership, and the burden of proving the contrary is thrown upon the defendant in the action.[1] But the possession of an instrument, payable to order, unindorsed by the payee or the last indorsee, is not *prima facie* proof of *bona fide* ownership,[2] unless it be in the possession of the personal representatives of a deceased payee or indorsee.[3] Nor is it *prima facie* proof of *bona fide* ownership for a prior indorser to have possession. He must show good title.[4]

It has also been held not to shift the burden of proof to the holder, if it be proven that the paper was executed without consideration between the original parties, at least in the cases where the instrument is payable to bearer, and is held by an indorsee.[5] But it has been held that if the

[1] Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 753; Brown *v.* Spofford, 95 U. S. 478; Faulkner *v.* Ware, 34 Ga. 498 (case of bill payable to bearer); Vallett *v.* Parker, 6 Wend. 615; Horton *v.* Bayne, 52 Mo. 531; Johnson *v.* McMurry, 72 Mo. 282; Holme *v.* Karsper, 5 Binn. 469; Hall *v.* Allen, 37 Ind. 541; Jackson *v.* Love, 82 N. C. 405; Merchants' & P. N. B. *v.* Trustees, 62 Ga. 271; Blum *v.* Loggins, 53 Tex. 136; Davis *v.* Bartlett, 12 Ohio St. 544; McCann *v.* Lewis, 9 Cal. 246; Palmer *v.* Nassau Bank, 78 Ill. 380; In re Tallahassee Man. Co., 64 Ala. 593.

[2] Dorn *v.* Parsons, 56 Mo. 601; Gibson *v.* Miller, 29 Mich. 355.

[3] Scoville *v.* Landon, 50 N. Y. 686. See as to possession of the heir, King *v.* Gottschalk, 21 Iowa, 512.

[4] Palmer *v.* Whitney, 21 Ind. 61; Mauldin *v.* Branch Bank, 2 Ala. 502. See also Oberle *v.* Schmidt, 86 Pa. St. 221.

[5] Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 757; Mechanics', etc., Bank *v.* Crow, 60 N. Y. 85; Grocers' Bank *v.* Penfield, 14 N. Y. S. C. (7 Hun) 279; Goodman *v.* Simonds, 20 How. 343; Bank of Pittsburg *v.* Neal, 22 Ind. 96; Murray *v.* Lardner, 2 Wall. 110; Baxter *v.* Ellis, 57 Me. 180; Cummings *v.* Thompson, 18 Minn. 252; Fletcher *v.* Cushee, 32 Me. 587; Kellogg *v.* Curtis, 69 Me. 212; Magee *v.* Badger, 34 N. Y. 247; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65; Cropsey *v.* Averill, 8 Neb. 157; Organ Co. *v.* Boyle, 10 Neb. 409; Harger *v.* Worral, 69 N. Y. 370; Duerson's Admr. *v.* Alsop, 27 Gratt. 248; Wilson *v.* Lazier, 11 Gratt.

instrument is payable to bearer there is nothing on the face of the instrument to indicate that it has been transferred and hence proof of want of consideration will throw upon the holder the burden of proving that he is a *bona fide* holder.[1] It would seem to be almost impossible for the maker to show want of consideration, without pointing out the additional fact that the instrument was delivered to some one other than the present holder. Furthermore, the reason assigned for the justification of this exception, is as applicable, when there is, as when there is no, consideration between the original parties, and has no more weight in one case than in the other.

But when fraud or illegality is proven to taint the original transaction, the difficulty of proving that the holder has knowledge of the same, and the usual rapidity of transfer of such instruments, for the purpose of realizing something out of the transaction, would seem to justify the shifting of the burden of proof, and the requirement that the holder should show affirmatively that he is a *bona fide* holder.[2]

478; Ellicott *v.* Martin, 6 Md. 509; Knight *v.* Pugh, 4 Watts & S. 445; Sloan *v.* Union Banking Co., 67 Pa. St. 479; Mathews *v.* Poythress, 4 Ga. 287; Mills *v.* Barber, 1 M. & W. 425; Low *v.* Chifney, 1 Bing. N. C. 267; Smith *v.* Braine, 16 Q. B. 244; Cook *v.* Helms, 5 Wis. 107; Greenaux *v.* Wheeler, 6 Tex. 515; Holeman *v.* Hobson, 8 Humph. 127; Davis *v.* Bartlett, 12 Ohio St. 537. See *contra*, Mayor of Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

[1] Bissell *v.* Morgan, 11 Cush. 198.

[2] Smith *v.* Sac County, 11 Wall. 139; Commissioners *v.* Clark, 94 U. S. 285; Collins *v.* Gilbert, 94 U. S. 761; Perrin *v.* Noyes, 39 Me. 384; Cuttle *v.* Cleaves, 70 Me. 256; Kellogg *v.* Curtis, 69 Me. 212; Roberts *v.* Lane, 64 Me. 108; Fitch *v.* Jones, 32 Eng. L. & Eq. 134; Smith *v.* Braine, 3 Eng. L. & Eq. 380; *s. c.* 16. Q. B. 244; Conley *v.* Winsor, 41 Mich. 253; Sperry *v.* Spaulding, 45 Cal. 544; Redington *v.* Wood, 45 Cal. 406; Devlin *v.* Clark, 31 Mo. 22; Horton *v.* Bayne, 52 Mo. 531; Johnson *v.* McMurry, 72 Mo. 282; Fuller *v.* Hutchins, 10 Cal. 526; McClintock *v.* Cummins, 2 McLean, 98; Vathir *v.* Zane, 6 Gratt. 246; Hutchison *v.* Bogg, 28 Pa. St. 294; Sloan *v.* Union Banking Co., 67 Pa. St. 470; Sistermans *v.* Field, 9 Gray, 331; Thompson *v.* Armstrong, 7 Ala. 256; Ross *v.* Drinkard, 35 Ala. 434; Kelly *v.* Ford, 4 Iowa, 140; Harbison *v.* Bank of Indiana, 28 Ind.

But in order that the proof of fraud may shift the burden of proof, it must be a fraud committed upon the maker; fraud against the payee or indorsee is insufficient.[1]

The burden of proof is also shifted to the holder, when it is shown that the instrument has been stolen or lost.[2] But the holder, in the case of fraud or illegality being proven, establishes his *prima facie* case again, by showing that he paid full value for it and took it in the ordinary course of business, and before maturity. He is not required to prove that he took the paper without notice of the fraud or illegality. The burden of proving notice is thrown upon the defendant. Although there are decisions to the contrary,[3] the weight of authority supports the doctrine here laid down.[4]

133; Merchants' & Planter's Nat. Bank *v.* Trustees, 62 Ga. 271; Duerson *v.* Alsop, 27 Gratt. 249; Boyd *v.* McIvor, 11 Ala. 822; Perkins *v.* Prout, 47 N. H. 387; Woodhull *v.* Holmes, 10 Johns. 231; McKesson *v.* Stanberry, 3 Ohio St. 156; Hall *v.* Featherstone, 3 Hurl. & N. 284; Bailey *v.* Bidwell, 13 M. & W. 73; National Bank *v.* Kirby, 108 Mass. 497; Emerson *v.* Burns, 114 Mass. 348; Naples *v.* Brown, 48 Pa. St. 458.

[1] Kinney *v.* Kruse, 28 Wis. 183. See Atlas Bank *v.* Doyle, 9 R. I. 76.

[2] Union Nat. Bank *v.* Barber, 56 Iowa, 559; Worcester Co. Bank *v.* Dorchester Bank, 10 Cush. 488; Mathews *v.* Poythress, 4 Ga. 287; Merchants' & P. Nat. Bank *v.* Trustees, 62 Ga. 271.

[3] Tilden *v.* Barnard, 43 Mich. 376, Marston, J.

[4] Davis *v.* Bartlett, 12 Ohio St. 541, Sutliff, C. J., saying: "The case of Monroe *v.* Cooper, 5 Pick. 412, is also relied upon by the defendants in this case as an authority. That was an action by the indorsee upon a negotiable note against the members of a partnership company, by whom the note purported to be made. Two of the three partners appeared, and pleaded the general issue, and, on the trial, offered to prove that the note was made by the other partner, who had made default in the case, for his own benefit, and not for the benefit or on account of the company or with the knowledge of the other partners; but as the defendants did not offer to prove, also, that the note was due when indorsed to the plaintiff, or that he had knowledge of the facts, the judge, on the trial of the case, was of the opinion that the facts so proposed to be proved did not amount to a defense, and excluded the proof. The Supreme Court, in revising this opinion, by Wilde, J., held that the defendants had the right to prove, if they could, that fraud was practiced in the inception of

§ 304. **The rights and powers of pledgees.** — It has been already fully explained, when pledgees are held to be *bona fide* holders of commercial paper.[1] Suffice it to say here that they are generally held to be *bona fide* holders for value, whether the paper is pledged for an antecedent or contemporaneous indebtedness.

So far as subsequent purchasers for value and without notice are concerned, the rights and powers of pledgees do not differ from the rights and powers of any other *bona fide* holder. The transfer by the pledgee will give a good title to the *bona fide* purchaser. But between the original parties, and as to subsequent indorsees and transferees having notice, the rights and powers of the pledgee differ very essentially from those of the ordinary indorsee.

The pledge being made for the purpose of securing the payment of a debt, the pledgee takes the paper somewhat

the note, or that it was fraudently put in circulation. And the judge adds: 'This fact being established will throw upon the plaintiff the burden of proof to show that he came by the possession of the note fairly and without any knowledge of the fraud.' There can be no doubt that the judgment of the Supreme Court, in this case also, was strictly correct; and if by the burden of proof to show possession of the note fairly and without knowledge of the fraud, he only meant that upon the defendants proving the note to have been fraudulently executed and put in circulation, that it was incumbent upon the plaintiff to prove that he received the negotiable paper before due in the usual course of trade, upon a valuable consideration, the remark of Judge Wilde is strictly correct, and consonant with the authorities to which he refers; but if his remark is to be understood as intimating that the rule in such a case imposes any further burden upon the plaintiff than to prove he purchased and received the transfer of the negotiable paper before due, in the usual course of trade, *bona fide*, and upon a valuable consideration, it is not only not sustained by, but is opposed to, the authorities to which he refers." See also, to the same effect, Kellogg *v.* Curtis, 69 Me. 214; Harbison *v.* Bank, 72 Ind. 133; Battles *v.* Landenstager, 84 Pa. St. 446; Tod *v.* Wick, 36 Ohio St. 390; Johnson *v.* McMurry, 72 Mo. 282. In Wortendyke *v.* Meehan, 9 Neb. 229, where holder paid value, it was held that he could not recover, since he did not *deny* having knowledge of the illegalty.

[1] See *ante*, §§ 166–168.

in the character of a trustee. He is entitled only to that part of the face value of the collateral security, which may be necessary to satisfy his own claim. Although in some of the States it is held that he can only recover of the parties to the security the amount of his own claim, leaving the balance to be collected by the pledgor,[1] the better opinion is that he can recover the whole of the face value, and hold the balance as trustee for the pledgor.[2] But the pledgee is a *bona fide* holder only in respect to the amount of his claim against the pledgor; and if there be a good defense to an action on the collateral by the pledgor, the recovery of the pledgee will be limited to the amount of his claim.[3] For the same reasons an accommodation indorser or maker is liable to an immediate pledgee only to the amount of his claim against the pledgor.[4]

In the collection and maintenance of actions on the pledge, the pledgee is charged with the exercise of ordinary diligence in saving and protecting the rights of the pledgor. And should he, by his negligence or by the negligence of his agents, fail to make the proper presentment for pay-

Steere *v.* Benson, 2 Bradw. 560; McCrum *v.* Corby, 11 Kan. 464; G. S Kan., ch. 114, § 14.

[2] Bank of Charleston *v.* Chambers, 11 Rich. 657; Tarbell *v.* Sturtevant, 26 Vt 513; Union Nat. Bank *v.* Roberts, 45 Wis. 373.

[3] Stoddard *v.* Kimball, 6 Cush. 469; Curtis *v.* Mohr, 18 Wis. 645; Exchange Bank *v.* Butner, 60 Ga. 654; Grant *v.* Kidwell, 30 Mo. 455; Williams *v.* Smith, 2 Hill, 301; White *v.* Springfield Bank, 3 Sandf. 222; N. Y. M. I. W. *v.* Smith, 4 Duer, 362; Youngs *v.* Lee, 12 N. Y. 551; Allaire *v.* Hartshorne, 21 N. J. L. 665; Duncan et al. *v.* Gibert, 30 N. J. L. 527; Chicopee Bank *v.* Chapin, 8 Met. 40; Fisher *v.* Fisher, 98 Mass. 303; Kingsland *v.* Pryor, 33 Ohio St. 19; First Nat. Bank *v.* Fowler, 36 Ohio St. 524; First Nat. Bank *v.* Werst, 52 Iowa, 684; Vallette *v.* Mason, 1 Smith (Ind.), 89.

[4] Fisher *v.* Fisher, 98 Mass. 303; Atlas Bank *v.* Doyle, 9 R. I. 76; Gordon *v.* Boppe, 55 N. Y. 665; Platt *v.* Beebe, 57 N. Y. 339; Buchanan *v.* International Bank, 78 Ill. 500; Duncan et al. *v.* Gilbert, 30 N. J. L. 527; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540; Mechanics', etc., Bank *v.* Barnett, 27 La. Ann. 177.

ment, or to give notice of dishonor to prior indorsers, he is liable to the pledgor for all damage he might suffer in consequence of his, the pledgee's, delinquencies of that nature.[1] But mere delay in bringing suit on the collateral security is no negligence.[2] On the contrary, the pledgee is not obliged to sue at all on the collateral security. He may instead bring his action against his own debtor, without first proceeding against the parties to the collaterals.

Although it has been held that the pledgee has the right to sell all sorts of stocks and annuities;[3] railroad, municipal and other coupon bonds,[4] the general rule is that the pledgee can not sell commercial paper for the satisfaction of the debt, particularly bills of exchange and promissory notes.[5] But even where the debt matures before the collateral, the pledgee is held not to have the power to sell the

[1] Russell *v.* Hester, 10 Ala. 535; Peacock *v.* Purcell, 14 C. B. (N. S.) 728; Pickens *v.* Yarborough, 26 Ala. 417; Powell *v.* Henry, 27 Ala. 612; Jennison *v.* Parker, 7 Mich. 355; Colquitt *v.* Stultz, 65 Ga. 305; Roberts *v.* Thompson, 14 Ohio St. 1; Betterton *v.* Roope, 3 B. J. Lea, 216; Bonta *v.* Curry, 3 Bush, 678; Slevin *v.* Morrow, 4 Ind. 425; Wakeman *v.* Gowdy, 10 Bosw. 208. But the instructions of the pledgor, and the agreement of the parties, may vary very materially the duties of the pledgee in this regard. Lee *v.* Baldwin, 10 Ga. 208.

[2] Marschuetze *v.* Wright, 50 Wis. 175; Cherry *v.* Miller, 7 B. J. Lea, 305.

[3] Tucker *v.* Wilson, 1 P. Wms. 261; *s. c.* 1 Bro. P. C. 494; Lockwood *v.* Ewer, 2 Atk. 303. In New York it is held that there must be a demand for the payment of the debt, before there can be a sale of stock. Wilson *v.* Little, 2 N. Y. 443.

[4] Brown *v.* Ward, 3 Duer 660; Morris Canal *v.* Lewis, 1 Beas. 322; Alexanderia, etc., Railroad *v.* Burke, 22 Gratt. 254; Jerome *v.* Carter, 94 U. S. 734. But see *contra*, as to railroad bonds, Joliet Iron Co. *v.* Scioto Brick Co., 82 Ill. 548; and, as to municipal orders, Whittaker *v.* Charleston Gas Co., 16 W. Va. 717.

[5] Wheeler *v.* Newbould, 16 N. Y. 392, Brown, J., saying: "A creditor holding such property in trust for the use of his debtor and offering it for sale in satisfaction of his debt can hardly fail to sacrifice it." Berg *v.* Foster, — Pa. St. — (1884). It is held that he may sell the collateral security after maturity. Potter *v.* Thompson, 10 R. I.

collateral.[1] It may be said that a court of equity may authorize the sale of the collateral, where the other remedies of the pledgee are inadequate, as where the pledgor resided in another State, and had no other property within the jurisdiction of the pledgee's courts.[2]

§ 305. **Bona fide holder of commercial paper secured by mortgage.** — Notwithstanding the contradiction of the authorities in respect to the legal character of a mortgage of real estate, it is universally conceded that the assignment of the debt will carry to the assignee the beneficial interest under the mortgage. Although it is still held in those States, which have to a greater or less degree discarded the common-law theory, that an effectual *legal* assignment of the mortgage requires a deed proved and acknowledged like all other deeds of conveyance, it is there held that, the debt being the principal thing and the mortgage only a security or lien, an assignment of the debt will operate as an equitable assignment of the mortgage, binding upon all persons having notice, and giving to the assignee the power in equity to exercise all the rights of the mortgagee.[3] But as

[1] Brown *v.* Ward, 3 Duer, 660. But see, *contra*, Richards *v.* Davis, 7 Am. Law Reg. 483.

[2] Donohue *v.* Gamble, 38 Cal. 354; Whittaker *v.* Charleston Gas Co., 16 W. Va. 716; Wheeler *v.* Newbould, 16 N. Y. 392; Nelson *v.* Wellington, 5 Bosw. 178; Brookman *v.* Metcalf, 5 Bosw. 429.

[3] Wolcott *v.* Winchester, 15 Gray, 461; Vose *v.* Handy, 2 Greenl. 322; Southerin *v.* Mendum, 5 N. H. 420; Northy *v.* Northy, 45 N. H. 140; Blake *v.* Williams, 36 N. H. 39; Langdon *v.* Keith, 9 Vt. 299; Keyes *v.* Wood, 21 Vt. 331; Lawrence *v.* Knap, 1 Root, 248; Dudley *v.* Caldwell, 19 Conn. 218; Neilson *v.* Blight, 1 Johns. Cas. 205; Evertson *v.* Booth, 19 Johns. 491; Parmelee *v.* Daun, 23 Barb. 461; Kortright *v.* Cady, 21 N. Y. 261; Wilson *v.* Troup, 2 Cow. 242; Craft *v.* Webster, 4 Rawle, 242; Danley *v.* Hays, 17 Serg. & R. 400; Partridge *v.* Partridge, 38 Pa. St. 78; Hyman *v.* Devereux, 63 N. C. 624; Muller *v.* Wadlington, 5 S. C. 242; Wright *v.* Eaves, 10 Rich. Eq. 585; Scott *v.* Turner, 15 La. Ann. 346; Wilson *v.* Heyward, 2 Fla. 27; *s. c.* 6 Fla. 191; Emanuel *v.* Hunt, 2 Ala. 190; Graham *v.* Newman, 21 Ala. 497; Dick *v.* Mawry, 17 Miss. 448;

a general proposition, such an assignee acquires no legal interest, and can therefore exercise none of the rights of a legal owner, such as the maintenance of an action of ejectment or a writ of entry.[1] And where the mortgage is given to secure two or more debts, the assignment of one of them will operate as an assignment of a *pro tanto* share in the mortgage, unless it is the expressed intention of the parties that the entire mortgage security should be retained for the benefit of the remaining debts.[2] This is always the case, in the absence of an express contract, where the debts secured by the same mortgage fall due at the same time.

Holmes *v.* McGinty, 44 Miss. 94; Martin *v.* Reynolds, 6 Mich. 70; Ladue *v.* R. R. Co., 13 Mich. 396; U. S. Bank *v.* Covert, 13 Ohio, 240; Paine *v.* French, 4 Ohio, 318; Miles *v.* Gray, 4 B. Mon. 417; Burdett *v.* Clay, 8 B. Mon. 287; Lucas *v.* Harris, 20 Ill. 165; Mapps *v.* Sharpe, 32 Ill. 165; Laberge *v.* Chauvin, 2 Mo. 179; Anderson *v.* Baumgartner, 27 Mo. 80; Potter *v.* Stevens, 40 Mo. 229; Burton *v.* Baxter, 7 Blackf. 297; French *v.* Turner, 15 Ind. 59; Crow *v.* Vance, 4 Iowa, 434; Bank of Indiana *v.* Anderson, 14 Iowa, 544; Fisher *v.* Otis, 3 Chandl. 83; Anderson *v.* Hart, 17 Wis. 297; Ord *v.* McKee, 5 Cal. 575; Willis *v.* Farley, 24 Cal. 497; Kutz *v.* Sponable, 6 Kan. 395.

[1] Cottrell *v.* Adams, 2 Biss. 351; Young *v.* Miller, 6 Gray, 152; Dwinel *v.* Perley, 32 Me. 197; Edgerton *v.* Young, 43 Ill. 464; Graham *v.* Newman, 21 Ala. 497; Partridge *v.* Partridge, 38 Pa. St. 78; Warden *v.* Adams, 15 Mass. 232. In the code States, however, where all actions are brought in the name of the party beneficially interested, the equitable assignee may enforce the mortgage in his own name, in any sort of remedy. Gower *v.* Howe, 20 Ind. 396; Langston *v.* Love, 11 Iowa, 580; Rankin *v.* Major, 9 Iowa, 297; Clearwater *v.* Rose, 1 Blackf. 138; Paine *v.* French, 4 Ohio, 320; Garland *v.* Richeson, 4 Rand. 266; Kurtz *v.* Sponable, 6 Kan. 395. And in those States where the legal title of the mortgage does not pass with the assignment of the debt, equity may compel the holder of the legal title to transfer it to the assignee of the debt, or to maintain the suits necessary for the protection of the assignee. Wolcott *v.* Winchester, 15 Gray, 461; Crane *v.* March, 4 Pick. 131; Mount *v.* Suydam, 4 Sandf. Ch. 399; Lyon's App., 61 Pa. St. 15; Baker *v.* Terrell, 8 Minn. 195; Morris *v.* Bacon, 123 Mass. 58; Strong *v.* Jackson, 123 Mass. 60; Burhans *v.* Hutcheson, — Kan. — (1881.)

[2] Donley *v.* Hays, 17 Serg. & R. 400; Belding *v.* Manly, 21 Vt. 550; Miller *v.* Rutland, etc., R. R. Co., 40 Vt. 39; Keyes *v.* Woods, 21 Vt. 331; Cooper *v.* Ulman, Walk. (Mich.) 251; Warden *v.* Adams, 15 Mass. 233.

But where they fall due at different periods, in very many of the States one has priority over the other in the order in which they fall due. The effect is the same as if there had been successive and independent mortgages, one for each debt.[1] It has also been held, but likewise denied, that the mortgage debts in the hands of assignees will have priority in the order of their assignment.[2]

If the instrument of indebtedness, which is secured by the mortgage, is non-negotiable, such as a bond, the assignee will take both it and the mortgage subject to all the defenses which might be set up against the mortgagee.[3] But, in some of the States, if the instrument of indebted-

[1] Stanley *v.* Beatty, 4 Ind. 134; Hough *v.* Osborne, 7 Ind. 140; McVay *v.* Bloodgood, 9 Port. 547; U. S. Bank *v.* Covert, 13 Ohio, 240; Wood *v.* Trask, 7 Wis. 566; Preston *v.* Hodges, 50 Ill. 56; Funk *v.* McReynolds, 33 Ill. 497; Mitchell *v.* Laden, 36 Mo. 532; Thompson *v.* Field, 38 Mo. 325; Langster *v.* Love, 11 Iowa, 580; Reeder *v.* Carey, 13 Iowa, 274; Iscit *v.* Lucas, 17 Iowa, 506; G. Wathmays *v.* Ragland, 1 Rand. 466; Wilson *v.* Hayward, 6 Fla. 171; Hunt *v.* Styles, 10 N. H. 466; Larrabee *v.* Lambert, 32 Me. 97. *Contra*, Darby *v.* Hays, 17 Serg. & R. 400; Henderson *v.* Herrod, 10 Smed. & M. 631; English *v.* Carney, 25 Mich. 178; Grattan *v.* Wiggins, 23 Cal. 30. But it is always competent for the parties to control the priority of the debts secured by the same mortgage, and may altogether exclude one or more from the enjoyment of the security. Bryant *v.* Damon, 6 Gray, 164; Langdon *v.* Keith, 9 Vt. 299; Mechanics Bank *v.* Bank of Niagara, 9 Wend. 410; Eastman *v.* Foster, 8 Met. 19; Stevenson *v.* Black, 1 N. J. Eq. 338; Wright *v.* Packer, 2 Aik. 212; Collum *v.* Erwin, 4 Ala. 452; Walker *v.* Dement, 42 Ill. 272; Bank of England *v.* Tarleton, 23 Miss. 178; Cooper *v.* Ulman, Walk. (Mich.) 251; Grattan *v.* Wiggins, 23 Cal. 30.

[2] Eastman *v.* Foster, 8 Met. 19; Noyes *v.* White, 9 Minn. 640. *Contra* Page *v.* Pierce, 26 N. H. 317; Stevenson *v.* Black, 1 N. J. Eq. 338; Betz *v.* Heebner, 1 Penn. 280; Henderson *v.* Herrod, 18 Miss. 631.

[3] Trustees Union College *v.* Wheeler, 61 N. Y. 88; Ingraham *v.* Disborough, 47 N. Y. 421; Davis *v.* Betchstein, 69 N. Y. 440 (25 Am. Rep. 218); Pendleton *v.* Fay, 2 Paige Ch. 202; Ellis *v.* Messervie, 11 Paige Ch. 467; *s. c.* 2 Denio, 640; Mott *v.* Clark, 9 Pa. St. 399; Twichell *v.* McMurtrie, 77 Pa. St. 383; Losey *v.* Sampson, 10 N. J. Eq. 247; Musgrove *v.* Kennell, 23 N. J. Eq. 75; Reeves *v.* Scully, Walk. (Mich.) 248; Nicholls *v.* Lee, 10 Mich. 526; Croft *v.* Bunster, 9 Wis. 503; Goulding *v.* Bunster, 9 Wis. 503; Hortsman *v.* Gerker, 49 Pa. St. 282.

ness be a negotiable note, the mortgage being treated as incident to the debt, receives from the note its negotiable character, and passes to the assignee free from the equities existing between the mortgagee and the mortgagor, unless by express terms the mortgage is assigned subject to the equities, or the assignee has notice of them. To be free from the equities, the assignment must be made before the debt falls due.[1] This rule, however, is not uniformly followed. In a number of States, the negotiable character of the note is held not to be imparted to the mortgage, which secures its payment. And, although, so far as the personal liability of the mortgager on the note is concerned, the assignee takes it free from the equities, the mortgage in his hands is subject to them.[2] But the assignee takes the mortgage subject to all prior liens and mortgages which have been duly recorded, and of which, consequently, he

[1] Carpenter *v.* Longan, 16 Wall. 271; Kennicott *v.* Supervisors, 10 Wall. 452; Sprague *v.* Graham, 29 Me. 160; Pierce *v.* Faunce, 47 Me. 507; Gould *v.* Marsh, 1 Hun, 566; Jackson *v.* Blodgett, 5 Cow. 203; Green *v.* Hart, 1 Johns. 580; Taylor *v.* Page, 6 Allen, 86; Young *v.* Miller, 6 Gray, 152; Breen *v.* Seward, 11 Gray, 118; Dutton *v.* Ives, 2 Mich. 515; Bloomer *v.* Henderson, 8 Mich. 395; Cornell *v.* Hichens, 11 Wis. 353; Webb *v.* Hazelton, 4 Neb. 308 (19 Am. Rep. 638); Burkhaus *v.* Hutcheson, 25 Kan. 631; Sawyer *v.* Prickett, 19 Wall. 166; Kelley *v.* Whitney, 45 Wis. 110; Murray *v.* Jones, 50 Ga. 109; Martineau *v.* McCollum, 4 Chand. 153; Kelmer *v.* Krolick, 36 Mich. 373; Judge *v.* Vogel, 38 Mich. 568; Cicotte *v.* Gazuier, 2 Mich. 381; Duncan *v.* Louisville, 13 Bush, 385-Preston *v.* Morris, 42 Iowa, 549; Farmers' Nat. Bank *v.* Fletcher, 44 Iowa, 256; Updegraft *v.* Edwards, 45 Iowa, 515; Clasey *v.* Sigg, 51 Iowa, 373. This same rule has been applied to deeds of trust, given to secure the payment of a negotiable note. New Orleans, etc., *v.* Montgomery, 95 U. S. 16; Potts *v.* Blackwell, 4 Jones (N. C.) Eq. 58.

[2] Olds *v.* Cummings, 31 Ill. 188; Sumner *v.* Waugh, 56 Ill. 531; White *v.* Sutherland, 64 Ill. 181; Bailey *v.* Smith, 14 Ohio St. 396; Bouligny *v.* Fortier, 17 La. Ann. 121; Johnson *v.* Carpenter, 7 Minn. 176; Walker *v.* Dement, 42 Ill. 278; Petillon *v.* Noble, 73 Ill. 507; Bryant *v.* Vix, 83 Ill. 14; Melendy *v.* Keen, 89 Ill. 395; U. S. Mortgage Co. *v.* Gross, 93 Ill. 483 C. D. & V. R. R. Co. *v.* Loewenthal, 93 Ill. 451; Morris *v.* White, 28 La. 855; Johnson *v.* Vickers, 31 La. Ann. 943.

has constructive notice.[1] And it needs only to be added, that in order that the assignee may claim to take the mortgage free from equities, he must be in every respect the *bona fide* holder of the note.[2]

[1] Linville *v.* Savage, 58 Mo. 248; Logan *v.* Smith, 62 Mo. 455; Simo *v.* Hammond, 33 Iowa, 368; English *v.* Wafles, 13 Iowa, 57.

[2] Crum *v.* Corby, 11 Kan. 464; Dobbins *v.* Parker, 46 Iowa, 358; Strong *v.* Jackson, 123 Mass. 60; Brownlee *v.* Arnold, 60 Mo. 79. But in Crosby *v.* Roth, 16 Wis. 625, where a note and mortgage were attached by the mortgagee to his negotiable bond, in which it was stated that the note and mortgage were transferred as security for the bond, and that they should be transferable with the bond, and not otherwise, it was held that this was a sufficient indorsement within the law merchant to pass the legal title to the note, and to make the obligee the *bona fide* holder of the same. Paine, J., said: "The intent to pass the title and make the note transferable by delivery afterwards as a note payable to order and duly indorsed by the payee, is beyond question. And this contract, like all others, must take effect, according to the intent of the parties, if it is sufficient in law to express that intent. And the fact that the parties contracted for an absolute liability by the vendor evidenced by a distinct negotiable instrument on the back of the one transferred, cannot, upon any rational principle, be held to distinguish the case, so far as the mere question of a transfer is concerned, from a case where they contract for no liability or for the conditional liability of a guarantor. I conclude, then, that if the bond had been written on the back of the note, it would have been fully sufficient to pass the legal title within the law merchant. See also Bang *v.* Flint, 25 Wis. 546.

CHAPTER XV.

PRESENTMENT FOR PAYMENT.

SECTION 310. The necessity for presentment — Effect on accrument of interest.
311. By whom presentment must be made.
312. When possession evidence of holder's right to present for payment.
313. To whom presentment should be made.
314. The place of presentment.
315. The time of presentment — Days of grace.
316. Computation of time — Effect of legal holidays.
317. At what hour of the day presentment should be made.
318. Mode of presentment.

§ 310. **The necessity for presentment — Effect on accrument of interest.** — It is necessary to make presentment for payment at maturity of commercial paper, in order to preserve the right of action against all parties secondarily liable on the paper. Such parties guarantee payment provided the presentment is made when the paper falls due. For this reason, the drawer of a bill of exchange cannot be sued unless the bill has been presented to the drawee or acceptor for acceptance and payment.[1] So, also, will the indorsers of any commercial paper, which is negotiable, be discharged from liability to the holder, if the paper has not been presented to the maker or acceptor for payment.[2] Even where the

[1] Munroe *v.* Easton, 2 Johns. Cas. 75; Burritt *v.* Tidmarsh, 5 Bradw. 341; Treadway *v.* Nicks, 3 McCord, 195; Dayton *v.* Trull, 23 Wend. 345. The holder will not only lose his remedy against the drawer on the bill itself, but likewise on the original consideration. Adams *v.* Darby, 28 Mo. 162.

[2] Magruder *v.* Union Bank, 3 Pet. 87; Cayuga Co. Bank *v.* Warden, 1

bill or note has been indorsed after maturity, there must be a demand for payment, before the indorser can be held liable.[1] Whether one who indorses a note or bill before delivery for the purpose of lending his credit to the paper, will be discharged by a failure to make a presentment for acceptance, will depend upon the view taken of the character of such an indorsement in the State in which this question arises.[2] If the party indorsing before delivery is held to be a first or second indorser, he is discharged if presentment for payment is not duly made at maturity.[3] But where he is held to be an original joint maker, or surety, or guarantor, he is held not to be entitled to demand of payment and notice.[4] Guarantors, and sureties in general,

N. Y. 413; Buddell *v.* Walker, 7 Ark. 457; Winston *v.* Richardson, 27 Ark. 347; Van Wickle *v.* Downing, 19 La. Ann. 83; Union Ins. Co. *v.* Rodd, 26 La. Ann. 715; Otto *v.* Belden, 28 La. Ann. 302; Duncan *v.* McCullough, 4 Serg. & R. 480; Brandt *v.* Nuckle, 28 Md. 436; Bank of Alexandria *v.* Young, 2 Cranch C. C. 52.

[1] Berry *v.* Robinson, 9 Johns. 121; Swartz *v.* Redfield, 13 Kan. 550; Shelby *v.* Judd, 24 Kan. 161; Branch Bank *v.* Gaffney, 9 Ala. 153; Dwight *v.* Emerson, 2 N. H. 159; Stockman *v.* Riley, 2 McCord, 398; McKinney *v.* Crawford, 8 Serg. & R. 351; Patterson *v.* Todd, 18 Pa. St. 426; Dixon *v.* Clayville, 44 Md. 573; Graul *v.* Strutzel, 53 Iowa, 712; Bemis *v.* McKenzie, 13 Fla. 553; Strong *v.* Duke, 5 Alb. L. J. 250; Beebe *v.* Brooks, 12 Cal. 308; McCall *v.* Witkouski, 16 La. Ann. 179. But no further demand is necessary, if the paper is indorsed after maturity with protest attached. Williams *v.* Mathews, 3 Cow. 252; St. John *v.* Roberts, 31 N. Y. 441. Demand is also necessary, where one transfers a note by delivery after maturity. Hunt *v.* Wadleigh, 26 Me. 271.

[2] For a full discussion of the character of such an indorsement, and the effect of the different views entertained on the subject see *ante*, §§ 270-272.

[3] Hooks *v.* Anderson, 58 Ala. 238; Kamm *v.* Holland, 2 Oreg. 59; Hall *v.* Newcomb, 7 Hill, 416; Taylor *v.* McCune, 11 Pa. St. 460; Field *v.* N. O. Newspaper Co., 21 La. Ann. 24; Riggs *v.* Waldo, 2 Cal. 485; Pierce *v.* Kennedy, 5 Cal. 138; Jones *v.* Goodwin, 39 Cal. 493; Clouston *v.* Barbiere, 4 Sneed, 336; Bronson *v.* Alexander, 48 Ind. 244; Cook *v.* Googins, 126 Mass. 410; Pub. Stats. Mass. (1882), ch. 77, § 15.

[4] Massey *v.* Turner, 2 Houst. 79; Manufacturer's Bank *v.* Follett, 11 R. I. 92; Cromwell *v.* Hewitt, 40 N. Y. 491; Kilnan *v.* Ashley, 24 Ark

are not discharged for failure of the holder to make presentment for payment. Their liability is an absolute and unconditional guaranty.[1]

It is never necessary to make presentment for payment at maturity, in order to hold liable the maker of a note, or the acceptor of a bill.[2] The only exception to the rule seems to be that there can be no action against the acceptor, where the bill is payable at or after sight, until demand has been made.[3] Although it has been claimed by some of the authorities, that if a bill or note is payable "on demand," or "on demand after" a stated time, the acceptor or maker cannot be held liable on the paper until demand has been

511; Clark *v.* Merriam, 25 Conn. 576; Peckham *v.* Gilman, 7 Minn. 446; McGee *v.* Connor, 1 Utah, 92; Weston Bldg. Ass. *v.* Wolff, 45 Mo. 104; Richards *v.* Warring, 1 Keyes, 576. But it has been held that in such a case, he may defend by showing that he has suffered damage in fact on account of the failure of the holder to present for payment at maturity. Camp *v.* Simmons, 62 Ga. 73; Sibley *v.* Van Horn, 13 Iowa, 209; Picket *v.* Hawes, 14 Iowa, 460; Rodabaugh *v.* Pitkin, 46 Iowa, 544. In Nevada he is entitled, as a guarantor, to reasonable notice of demand and dishonor. Van Doren *v.* Tjader, 1 Nev. 380.

[1] Cooper *v.* Page, 25 Me. 73; Baker *v.* Kelley, 41 Miss. 697; Walton *v.* Mascall, 13 M. & W. 452; *s. c.* 2 D. & L. 420; Clay *v.* Edgerton, 19 Ohio St. 549; Warrington *v.* Furbor, 8 East, 245; Holbrow *v.* Wilkins, 1 B. & C. 10; Williams *v.* Granger, 4 Day, 444; Breed *v.* Hillhouse, 7 Conn. 523; Allen *v.* Rightmere, 20 Johns. 365; Winchell *v.* Daty, 15 Hun, 1; Tatum *v.* Bonner, 27 Miss. 760; Bond *v.* Storrs, 13 Conn. 412; Benton *v.* Gibson, 1 Hill (S. C.), 56. But it has been held that the guarantor is discharged, if he can show damage by reason of the failure to present for payment. Weller *v.* Hawes, 19 Iowa, 443.

[2] Rhodes *v.* Gent, 5 B. & Ald. 244; Jackson *v.* Packer, 13 Conn. 342; Armstrong *v.* Caldwell, 2 Ill. 546; Yeaton *v.* Berney, 62 Ill. 61; State Bank *v.* Fox, 3 Blatchf. 431; Merchants', etc., Bank *v.* Evans, 9 W. Va. 373; Amd. Code, W. Va. (1884), ch. 9, § 1; Wolcott *v.* Van Santvoord, 17 Johns. 248; Blair *v.* Bank of Tennessee, 11 Humph. 83; Wegersloffe *v.* Keene, 1 Stra. 222; Rice *v.* Hogan, 8 Dana, 134.

[3] Dixon *v.* Muttall, 1 C. M. & R. 307; *s. c.* 6 C. & P. 320. The acceptor *supra protest* can require the note to be first presented to the drawee. Hoare *v.* Cazenove, 16 East, 391; Schofield *v.* Taylor, 3 Wend. 488.

made;[1] the better opinion is that, since the acceptor or maker can at any time extinguish his liability by payment, his liability does not depend upon any formal demand being made upon him. The suit itself is a sufficient demand.[2] It is not even necessary, as against the maker or acceptor, to make a formal presentment, where the place of payment is specified in the instrument.[3]

[1] Wallace *v.* McConnell, 13 Pet. 136, Thompson, J., saying: "Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made, and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded." See to the same effect, Armistead *v.* Armistead, 10 Leigh, 521; Sanderson *v.* Bowes, 14 East, 500; Caldwell *v.* Cassidy, 8 Cow. 271 (overruled by Haxtum *v.* Bishop, 3 Wend. 1).

[2] Jackson *v.* Packer, 13 Conn. 342; Hill *v.* Henry, 17 Ohio, 1; Rumball *v.* Ball, 10 Mod. 38; McKinney *v.* Whipple, 61 Me. 98; Gammon *v.* Everett, 25 Me. 66; Norton *v.* Elliam, 2 M. & W. 461; Middleton *v.* Boston Locomotive Works, 26 Pa. St. 257; New Hope D. B. *v.* Perry, 11 Ill. 467; Cook *v.* Martin, 5 Smed. & M. 379; Woodward *v.* Drennan, 3 Brev. 189; Collins *v.* Trotter, 81 Mo. 275; McFarland *v.* Cutter, 1 Mont. 383; Ziel *v.* Dukes, 12 Cal. 479; Bell *v.* Salkett, 38 Cal. 407. It is also not necessary, where the note is payable a certain time "after demand." Chillicothe Branch Bank *v.* Fox, 3 Blatchf. 431; Dodd *v.* Gill, 3 F. & F. 261; Gillson *v.* Hill, 4 Gray, 316; Lynch *v.* Goldsmith, 64 Ga. 42. But see Chase *v.* Evoy, 49 Cal. 467.

[3] Bank of the United States *v.* Smith, 11 Wheat. 173; Dawley *v.* Wheeler, 72 Vt. 574; Bank of Kentucky *v.* Hickey, 4 Litt. 225; Foden *v.* Sharp, 4 Johns. 183; Wolcott *v.* Van Santvoord, 17 Johns. 248; Green *v.* Goings, 7 Barb. 652; Picquet *v.* Curtis, 1 Sumn. 478; Blair *v.* Bank of Tennessee, 11 Humph. 83; Wallace *v.* McConnell, 13 Pet. 136; Cox *v.* National Bank, 100 U. S. 714; Yeaton *v.* Berney, 62 Ill. 61; Schoharie Co. Nat. Bank *v.* Bevard, 51 Iowa, 258; Ruggles *v.* Patten, 8 Mass. 480; Merchants' Bank *v.* Evans, 9 W. Va. 373; Hill *v.* Allen, 37 Ind. 541; McCullough *v.* Cook, 34 Ind. 334; Caldwell *v.* Cassidy, 8 Cow. 271; McNairy *v.* Bell, 1 Yerg. 502; Montgomery *v.* Tutt, 11 Cal. 307; Thiel *v.* Conrad, 21 La. Ann. 214; Renshaw *v.* Richards, 30 La. Ann. 398; Howard *v.* Bowman, 17 Wis. 459; Reeve *v.* Pack, 6 Mich. 240; Hills *v.* Place, 48 N. Y. 520. In England, it has been held that where the place of payment is named, the maker or acceptor is not bound, unless presentment has been made at the place of payment. Rowe *v.* Young, 2 Brod. & Bing. 165; *s. c.* Bligh, 391; Emblem *v.* Dartnell, 12 M. & W. 830; Gibb *v.* Mather, 8 Bing. 214; Sanderson *v.* Bowes, 14 East, 500. But the place

But as a general rule, it is necessary to make presentment for payment at the specified place of payment, in order to hold the drawer and indorsers liable.[1] Where the place of payment is specified, and the maker or acceptor can prove himself to have been at the place, on the day of payment, ready to pay the amount due; the failure of the holder to present for payment will prevent any subsequent recovery of damages and costs.[2] It must, however, not be understood that the maker or acceptor is relieved from the liability on the paper, if the paper is payable at a particular bank, and the money which is deposited at that bank to meet the maturing debt, is lost by the insolvency or misappropriation of the bank, because the holder failed to present the paper for payment at maturity.[3]

of payment must be named in the body of the instrument to have that effect. Sanderson *v.* Judge, 2 H. Bl. 509. An act of parliament, 1 & 2 Geo. IV., has provided that presentment at the place of payment is not necessary to bind the acceptor of a bill, unless the provision assumes the form of a qualified acceptance, to pay at that place and nowhere else. As to qualified acceptances, see *ante*, § 227.

[1] Bank of the United States *v.* Smith, 11 Wheat. 171; Cox *v.* National Bank, 100 U. S. 712; Shaw *v.* Reed, 12 Pick. 132; Farner *v.* Williams, 37 Barb. 9; Watkins *v.* Crouch, 5 Leigh, 522; Brown *v.* Hull, 23 Gratt. 27; Nichols *v.* Poole, 2 Jones (N. C.) 33; Lawrence *v.* Dobyns, 30 Mo. 196.

[2] Bacon *v.* Dyer, 17 Me. 19; Armistead *v.* Armistead, 10 Leigh, 525; Watkins *v.* Cronen, 5 Leigh, 322; Mulherrin *v.* Hannum, 2 Yerg. 81; Bank of Charleston *v.* Zorn, 14 S. C. 444; Hills *v.* Place, 48 N. Y. 520; Lazier *v.* Horar, 55 Iowa, 75.

[3] Ward *v.* Smith, 7 Wall. 447; Walton *v.* Henderson, Smith (N. H.) 168; Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62; Carley *v.* Vance, 17 Mass. 389; Wood *v.* Mechanics', etc., 41 Ill. 267; Haxton *v.* Bishop, 3 Wend. 13; Adams *v.* Hackensack, etc., Co., 15 Vroom, 638, Depue, J., saying: "Unless the banker has been made the agent of the holder by the indorsement of the paper or the deposit of it for collection, any money which the banker receives to apply in payment of it will be deemed to have been taken by him as the agent of the payer. * * * The only effect of the payer having money at the bank where the paper is payable is that it will enable him to plead a tender in exoneration of interest and costs of suit, provided he makes his tender good by payment of the prin-

In respect to the liability for accruing interest, the distinction is made between those cases in which interest is expressly reserved and runs from the date of the instrument, and those cases where there is no express stipulation for interest, and the interest only accrues from maturity. In the former cases, no failure to present for payment will stop the accrument of interest, and nothing but a tender of payment by the maker or acceptor will do so.[1] And so, also, where there is no reservation of interest, and no demand made, it has been held that interest will run from maturity, if the instrument is payable at a time certain.[2] But if the paper be payable on demand, and there is no interest reserved, it will bear interest only from demand. In such cases, the interest is charged as damages for the failure to pay.[3]

There can be no recovery of interest, if the paper is payable at a specified place, and the holder did not present it there for payment.[4]

cipal into court." But see Bank of Charleston *v.* Zorn, 14 S. C. 444; Lazier *v.* Horan, 55 Iowa, 75.

[1] Dent *v.* Dunn, 3 Camp. 296; Suffolk Bank *v.* Worcester Bank, 5 Pick. 106; Laughlin *v.* Wright, 63 Cal. 113; Thiel *v.* Conrad, 21 La. Ann. 214.

[2] Lowndes *v.* Collins, 17 Ves. 27; Sweet *v.* Hooper, 62 Me. 54; Jacobs *v.* Adams, 1 Dall. 521; Laing *v.* Stone, 2 Man. & Ry. 561; Joyner *v.* Turner, 19 Ark. 690; Lithgow *v.* Lyon, 1 Coop. Ch. 22. But see Bradford *v.* Cooper, 1 La. Ann. 325; Bann *v.* Dalzell, M. & M. 228; *s. c.* 3 C. & P. 376.

[3] Barrough *v.* White, 4 B. & C. 327; *s. c.* 6 Dowl. & Ry. 379; *s. c.* 2 C. & P. 8; Farquhar *v.* Morris, 7 T. R. 124; Hard *v.* Palmer, 21 U. C. Q. B. 49; Upton *v.* Lord Fersers, 5 Ves. 801; Nelson *v.* Cartmel, 6 Dana, 8; Breyfogle *v.* Beckley, 16 Serg. & R. 264; Wallace *v.* Wallace, 8 Bradw. 69; Maxey *v.* Knight, 18 Ala. 300; Hunter *v.* Wood, 54 Ala. 71; Cannon *v.* Beggs, 1 McCord, 370; Dillon *v.* Dudley, 1 A. K. Marsh. 66; Schmidt *v.* Limehouse, 2 Bailey, 276; Hunt *v.* Nevers, 15 Pick. 500; Bartlett *v.* Marshall, 2 Bibb., 467; Gore *v.* Buck, 1 Mon. 209. But see Proctor *v.* Whitcomb, 137 Mass. 303; Edgmon *v.* Ashelby, 76 Ill. 161; Pullen *v.* Chase, 4 Ark. 210; Walker *v.* Wills, 5 Ark. 166.

[4] Phillips *v.* Franklin, Gow. N. P. 196; Murray *v.* East India Co., 5 B. & Ald. 204.

In a few of the States the law merchant has been modified by statute, in respect to the necessity of presentment for acceptance. In Illinois and North Carolina presentment is not necessary to hold the indorser of a note.[1] In Minnesota, the indorser will be liable on a demand note, if presentment is made within sixty days.[2] In Texas, presentment to acceptor or maker for payment, is not necessary to hold the drawer or indorser, if suit is brought against the drawer or the indorser at the next term of the court after the maturity of the paper.[3] In Georgia, presentment for payment is not necessary as to notes held by the Central Bank of Georgia, this privilege being given to this bank by its charter, and the law merchant applies without change to all other commercial paper.[4]

§ 311. **By whom presentment must be made.** — Any *bona fide* holder, and any one having lawful possession for the purpose of collection, may present the paper for payment at maturity, and receive payment. And payment to such a person will extinguish the liability of the parties to the paper.[5] But for the purpose of making protest for non-payment, where protest is necessary to preserve the liability of parties secondarily liable on the paper, the presentment for payment is required to be made by the

[1] Harding *v.* Dillery, 60 Ill. 528; N. C. Code (1883), § 50.

[2] G. S. Minn. (1878), ch. 23, § 12.

[3] R. S. Tex. (1879), arts. 264, 973. See Sydnor *v.* Gascoigne, 11 Tex. 449.

[4] Central Bank *v.* Whitfield, 1 Ga. 593; Merchants' Bank *v.* Central Bank, 1 Ga. 418; Lynch *v.* Goldsmith, 64 Ga. 42; Williams *v.* Lewis, 69 Ga. 825; Beckwith *v.* Carleton, 14 Ga. 691; Butler *v.* Marine & Fire Ins. Co., 18 Ga. 517. See Hoadly *v.* Bliss, 9 Ga. 303. And the law merchant also applies to foreign bills, although in the hands of the privileged bank. Davies *v.* Byrne, 10 Ga. 329. But see Beckwith *v.* Carleton, *supra*, as to foreign notes.

[5] Lefty *v.* Mills, 4 T. R. 170; Bachelor *v.* Priest, 12 Pick. 399; Sussex Bank *v.* Baldwin, 2 Harrison, 487; Agnew *v.* Bank of Gettysburg, 2 Harr. & G. 478.

notary public, or at least by his clerk or deputy.[1] The presentment need not be made by the indorsee, or other person who is entitled to receive payment. It may be made by his duly authorized agent, and his authority need not be in writing, although possibly the maker or acceptor may require a written authority, or an indorsement to the agent, before being compelled to make payment.[2]

If the holder is bankrupt, and his estate has passed into the hands of an assignee, the assignee is the proper party to make presentment.[3] If the holder be dead, when the paper falls due, his personal representatives should make presentment.[4] And if no personal representatives have been appointed when the paper falls due, presentment should be made within a reasonable time after their appointment.[5] If the holder be a woman, and she should marry afterward, her husband would be the proper person to present the paper for payment. So, likewise, should the presentment be made by the surviving partners of a firm, after the death of one, where the firm was the payee or indorsee.[6] If the paper is in the possession of a pledgee, he should make the presentment for payment; but if it is in possession of the pledgor, the pledgor should present it.[7]

[1] See *post*, Chapter on Protest.

[2] Hartford Bank *v.* Barry, 17 Mass. 94; Freeman *v.* Boynton, 7 Mass. 483; Shed *v.* Brett, 1 Pick. 40; Seaver *v.* Lincoln, 21 Pick. 267; Hartford Bank *v.* Stedman, 2 Conn. 489; Bank of Utica *v.* Smith, 18 Johns. 230; Williams *v.* Matthews, 18 Cow. 252; Sussex Bank *v.* Baldwin, 2 Harr. 487; Coore *v.* Callaway, 1 Esp. 115; Cole *v.* Jessup, 10 N. Y. 96; Agnew *v.* Bank of Gettysburg, 2 Harr. & G. 478; Baer *v.* Leypert, 12 Hun, 515; Smith *v.* Ralston, Morris, 87.

[3] 1 Parsons, N. & B. 360; 1 Daniel's Negot. Inst., § 578; Hill *v.* Reed, 16 Barb. 280.

[4] 1 Parsons' N. & B. 360; Story's Prom. Notes, § 249; 1 Daniel's Negot. Inst. 521.

[5] White *v.* Stoddard, 11 Gray, 528.

[6] 1 Daniel's Negot. Inst., § 578; Story on Bills, § 360; Story on Prom. Notes, § 250.

[7] Jennison *v.* Parker, 7 Mich. 355; Cowperthwaite *v.* Sheffield, 1 Sandf. 447.

§ 312. **When possession evidence of holder's right to present for payment.** — If the paper is payable to bearer, or has been indorsed in blank, the possession is held to be *prima facie* proof of the right of the holder to present the paper for payment.[1] But if the paper is payable to order, and is unindorsed, or indorsed to order, the possession is not *prima facie* proof of ownership, and further proof is required to show the right to demand payment.[2] Nor is the possession by one, claiming to be an agent of the indorsee or payee, *prima facie* proof of authority to demand payment in the name of the *bona fide* owner. If the person so representing himself be in fact the agent of the holder of the paper, payment to such an agent would be lawful and would extinguish the liability of all parties to the paper. But if his agency should prove to be unauthorized, the holder and lawful owner would not be deprived of his right to demand payment.[3] But if the holder can prove an assignment by extraneous facts, the want of an indorsement will not prevent his making a presentment for payment.[4]

Whether an indorser is presumed from having possession of the paper to have the right to demand payment, is a matter of great dispute. Some of the authorities hold that

[1] Bachellor *v.* Priest, 12 Pick. 399; Cone *v.* Brown, 15 Rich. 262; Jackson *v.* Love, 82 N. C. 405; Agnew *v.* Bank of Gettysburg, 2 Harr. & G. 478.

[2] 1 Daniel's Negot. Inst., § 574.

[3] Doubleday *v.* Kress, 50 N. Y. 413, Peckham, J., saying: "Mere possession of the note by the assumed agent, Murray, unindorsed, without any other sustaining facts, is not sufficient to authorize payment to him." Hannon *v* Sullivan, 3 Mo. App. 583; Dodge *v.* National Exchange Bank, 30 Ohio St. 1; Wardrop *v.* Dunlop, 1 Hun, 325; Thompson on Bills, 245. *Contra*, Jackson *v.* Love, 82 N. C. 405.

[4] Pease *v.* Warren, 25 Mich. 9, Cooley, J., saying: "The indorsement would have been necessary to enable him (the holder) to sue at law on the notes in his own name, but if he was the real owner he was entitled to demand and receive payment whether they were indorsed or not, and final assignment, duly acknowledged and recorded, was the best possible proof of ownership."

he is presumed to have the right to present for payment, if the subsequent indorsements have been cancelled:[1] while other authorities maintain that his possession is presumptive evidence of his right of ownership, whether the subsequent indorsements are cancelled or uncancelled.[2]

§ 313. **To whom presentment should be made.** — As a general proposition, it is clear that the presentment should be made to the acceptor of a bill or the maker of a promissory note, for they are the primary debtors. And if they can be found, the presentment must be made to them personally. But if they cannot be found at their places of business or at their residences, or, if a place of payment is specified, at that place, on the day that the paper matures; demand should be made of any one, who had arrived at years of discretion, and who is seen by the holder or his agent at any one of these places. Thus, upon failing to find the acceptor or the maker, respectively, demand of payment can be made of the wife, clerk or other agent who would likely be trusted with transactions of the sort. The acceptor and the maker should have made provision for the payment of their obligations.[3] It was even held sufficient

[1] Bank of Utica *v.* Smith, 18 Johns. 230; Dollfus *v.* Frosch, 1 Denio, 367; Chautauqua Co. Bank *v.* Davis, 21 Wend. 584; Bowie *v.* Duvall, 1 Gill & J. 175; Brinkley *v.* Going, Breese, 288; Kyle *v.* Thompson, 2 Scam. 432.

[2] Dugan *v.* United States, 3 Wheat. 172; Picquet *v.* Curtis, 1 Sum. 478; Lonsdale *v.* Brown, 3 Wash. C. C. 404; Norris *v.* Badger, 6 Cow. 449; Bank of Kansas City *v.* Mills, 24 Kan. 610. See Bank of U. S. *v.* United States, 2 How. 711; Jones *v.* Fort, 9 B. & C. 764; Batchellor *v.* Priest, 12 Pick. 399; Merz *v.* Kaiser, 20 La. Ann. 377. But see Welch *v.* Lindo, 7 Cranch S. C. 159; Thompson *v.* Flower, 13 Mart. (La.) 301.

[3] Mathews *v.* Haydon, 2 Esp. 509; Brown *v.* McDermott, 5 Esp. 265; Stewart *v.* Eden, 2 Caines, 12; Sanford *v.* Norton, 17 Vt. 285; Reynolds *v.* Chettle, 2 Camp. 596; Crenshaw *v.* McKiernan, Minor, 295; Nelson *v.* Fotteral, 7 Leigh, 180; Stainback *v.* Bank of Virginia, 11 Gratt. 260; Merchants' Bank *v.* Spicer, 6 Wend. 443; Draper *v.* Clemons, 4 Mo. 52; Phillips *v.* Poindexter, 18 Ala. 579; Bradley *v.* Northern Bank, 60 Ala. 259;

to have made presentment to an inmate of the acceptor's house who informed the holder of the acceptor's removal, a card being left for the acceptor informing him of the maturity of the bill.[1] But merely stating in the protest the fact of presentment "at the office of the maker," without adding to whom, is insufficient, unless it is also stated that no one answered the call. The holder is not obliged to hunt up the maker or acceptor if he cannot find him or any representative of his, at his residence or place of business.[2] If the acceptor or maker be dead, demand of payment should be made of his personal representative, if his residence or place of business can be ascertained with reasonable diligence.[3] But if there be no personal representative, it is sufficient for the presentment to have been made at the residence of the deceased obligor, to any person of years of discretion, who could be seen, unless the

Branch Bank *v.* Hodges, 17 Ala. 42; Bank of England *v.* Newman, 12 Mod. 241; *s. c.* 1 Ld. Raym. 442; Hunt *v.* Maybee, 7 N. Y. 266; Cromwell *v.* Hynson, 2 Camp. 496; Whaley *v.* Houston, 12 La. Ann. 585; Moodie *v.* Morrall, 1 Const. R. 367; Hawkey *v.* Borwick, 1 Younge & J. 376; 4 Bing. 135; Phillips *v.* Astberg, 2 Taunt. 206. In presenting to a corporation for payment, care must be taken that the presentment is made to the officer or agent, who is authorized to pay the liabilities of the corporation. Casco Bank *v.* Mussey, 19 Me. 20; Spaun *v.* Baltzell, 1 Fla. 301; McKee *v.* Boswell, 33 Mo. 567; Newark India Rubber Co. *v.* Bishop, 3 E. D. Smith, 48; Crenshaw *v.* McKiernan, Minor, 295.

[1] Buxton *v.* Jones, 1 Man. & G. 83; *s. c.* 1 Scott N. R. 19. But this cannot be considered a reliable ruling. See *post* § 314.

[2] Stivers *v.* Prentice, 3 B. Mon. 461; Nave *v.* Richardson, 36 Mo. 130.

[3] Magweder *v.* Union Bank, 3 Pet. 87; Gower *v.* Moore, 25 Me. 16; Juniata Bank *v.* Hale, 16 Serg. & R. 167; Groth *v.* Gyger, 31 Pa. St. 271; Price *v.* Young, 1 Nott & McC. 438. If a representative has in fact been appointed, paper must be presented at his place of business or residence, although he may be temporarily absent from the State. Presentment at the maker's place of business is not sufficient under such circumstances. Frayzer *v.* Dameron, 6 Mo. App. 153. The maker's death and the appointment of a personal representative will not be presumed against an indorser, even though it is so stated in the protest. These facts must be proven. Weems *v.* Farmers' Bank, 15 Md. 231.

instrument was payable at a particular place, when it will be sufficient to make presentment at that place.[1]

If there are two or more obligors to the instrument, who sign as partners, presentment need only be made to one of the partners. It is not necessary to make presentment to all,[2] even though the partnership is already dissolved. The partner's authority to bind the firm by his acts continues after the dissolution in respect to all antecedent transactions until they are closed.[3] If the partnership had been dissolved by the death of one of the partners, demand should be made of the survivor, and not of the personal representative of the deceased partner.[4]

As a general proposition, it is conceded that, where there are two or more obligors, who are not partners, demand should be made of all the obligors.[5] It has, however, been

[1] Philpot *v.* Bryant, 1 Moore & P. 754; Simmon *v.* Reynaud, 10 La. Ann. 506; Bank of Washington *v.* Reynolds, 2 Cranch C. C. 289; 3 C. & P. 244; 4 Bing. 717; Holtz *v.* Boppe, 37 N. Y. 634; Hale *v.* Burr, 12 Mass. 86; Boyd's Admr. *v.* City Savings Bank, 15 Gratt. 501; Davis *v.* Francisco, 11 Mo. 572; Price *v.* Young, 1 Nott & McC. 438. If the maker or acceptor dies on or near the day of maturity, and no representative has been appointed, the fact that the burial has not occurred will not be a sufficient excuse for leaving without making a demand for payment, and the demand must be made of some heir or representative of the deceased. A domestic servant is not a capable representative, even under these exceptional circumstances. Toby *v.* Maurian, 7 La. 493; Huff *v.* Ashcraft, 1 Disney, 277.

[2] Shed *v.* Brett, 1 Pick. 401; Hunter *v.* Hempstead, 1 Mo. 61; Branch of State Bank *v.* McLeran, 26 Iowa, 306; Greatlake *v.* Brown, 2 Cranch C. C. 541; Thompson on Bills, 281.

[3] Hubbard *v.* Matthews, 54 N. Y. 50; Crowley *v.* Barry, 4 Gill, 194; Brown *v.* Turner, 15 Ala. 632; Coster *v.* Thomason, 19 Ala. 717; Fourth Nat. Bank *v.* Henschen, 52 Mo. 207. It will be sufficient under such circumstances to make demand of the agent of one of the partners. Brown *v.* Turner, *supra*.

[4] Kayuga Co. Bank *v.* Hunt, 2 Hill, 635; 1 Parsons' N. & B. 362; Story on Bills, §§ 346–362.

[5] Union Bank *v.* Willis, 8 Metc. 504; Willis *v.* Green, 5 Metc. 232; Arnold *v.* Dresser, 8 Allen, 435; Taylor *v.* Davidson, 2 Cranch C. C. 434;

held that, where the joint obligors are living in different places, so far apart that presentment cannot be made to all on the same day, it will be sufficient to make presentment to the one who was the most accessible.[1] But the better opinion is, that if the joint obligors live so far apart, that demand cannot be made of all of them on the same day, the presentment may be made, within a reasonable time afterward, to those who are inaccessible on the day of maturity.[2] But if the paper is payable in a given place, it will not be necessary to make presentment to any but the resident makers.[3]

If one of two or more joint obligors dies, presentment should be made to the survivor; but if it be a joint and several obligation, it is probably necessary to make presentment also to the personal representative of the deceased obligor.[4]

If a bill has been accepted *supra protest*, presentment should be made to both the drawee and the acceptor *supra protest*, and both presentments should be averred in the protest, and in the declaration of an action on the bill.[5]

Britt *v.* Lawson, 22 N. Y. S. C. (15 Hun) 123; Nave *v.* Richardson, 36 Mo. 130; Gates *v.* Beecker, 60 N. Y. 523; Bank of Red Oak *v.* Orvis, 40 Iowa, 332; Blake *v.* McMillan, 22 Iowa, 258; *s. c.* 33 Iowa, 150. But if they have signed in the usual manner of partners, they will be presumed to be partners, and demand need be made only of one of them. Erwin *v.* Downs, 15 N. Y. 375.

[1] Harris *v.* Clark, 10 Ohio, 5, Hitchcock, J., saying: "Now, suppose the makers resided in different States, or in different and distant parts of the same State, how could demand be made of all in order to charge an indorser? It must be made on the day the note falls due, or, where days of grace or allowed, on the last day of grace. Will it be said that the demand can be made at different and distant places on the same day through the agency of letters of attorney? I believe such a practice has not been heard of, at least we have found nothing like it in the books."

[2] 1 Daniel's Negot. Inst., § 595; 1 Parsons' N. & B. 363, note *w*; Story on Notes, §§ 239, 255, note 2.

[3] Smith *v.* Little, 10 N. H. 526.

[4] Story on Notes, § 256; 1 Daniel's Negot. Inst., § 596.

[5] Mitchell *v.* Baring, 10 B. & C. 4; Williams *v.* Germaine, 7 B. & C.

§ 314. **The place of presentment.** — If there is nothing in the paper, from which the place of presentment may be inferred, it will be presumed to be the maker or acceptor's domicile, or the place where he carries on business.[1] But the place of the date is *prima facie* the place of payment, for one is supposed to execute his commercial obligations at his domicile or place of business. And if it happens that the place of the date is not the domicile or place of business of the maker or acceptor, the holder is not required to make inquiries after the maker's or acceptor's domicile or place of business. As long as he does not know where the maker resides, he satisfies the law, if he holds the paper in readiness to receive payment in the place of the date.[2] But in order to free himself from the charge of negligence in searching after the maker, where his residence or place of business is proved to have been elsewhere, the holder is not obliged to show that he made inquiries after the maker's domicile.[3]

468; Hoare *v.* Cazenove, 16 East, 391. In California, Dakota and Utah, this double presentment is required by statute. Utah P. L. (1882), 61, § 82; 1 Hittell's Codes and Stats. (Cal., 1880), § 8180; Dakota Rev. Code (1877), § 1893.

[1] Cox *v.* National Bank, 100 U. S. 713; Mitchell *v.* Baring, 10 B. & C. 11.

[2] Meyer *v.* Hibscher, 47 N. Y. 270, Folger J., saying: "In such case (the note being dated at a place, and payable generally), the note must be presented and payment asked for at the place of business therein of the maker, if he has one; and if he has no place of business, then at his place of residence. And if he have neither place of business nor residence, then, if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand." See to same effect Britton *v.* Nichols, 104 U. S. 757; Root *v.* Franklin, 3 Johns. 207; Mason *v.* Franklin, 2 Johns. 202; Stewart *v.* Eden, 2 Caines, 121; Staylor *v.* Williams, 24 Md. 199; Cox *v.* National Bank, 100 U. S. 704; Moodie *v.* Morrall, 3 Const. R. 367; Apperson *v.* Bynum, 5 Cold. 348. But see Apperson *v.* Pritchard, 9 Heisk. 793. But see *contra*, 1 Parsons' N. & B. 458; Mason *v.* Pritchard, 9 Heisk. 797.

[3] Smith *v.* Philbrick, 10 Gray, 252, Merrick, J.: "This is an action brought by indorsers against a prior indorser to recover the contents of

But the place of payment may be agreed upon and proved by parol evidence, where there is no express designation of a place of payment in the body of the instrument; and the presumption that the place of the date is the place of payment, being an inference outside of the instrument itself, must give way to the express agreement of the parties to the contrary, although there is no written evidence of the agreement. The parol evidence is held in such cases not to vary or control a written instrument.[1] But when a

a promissory note. At its maturity, the holder placed it in the hands of a notary public, who, by his direction, went with it to the place of business which the maker formerly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained. The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then, and has ever since, resided at Port Lavacca, in the State of Texas, where he has his only place of business. At the trial no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston, or elsewhere; there was no evidence whatever upon that question. * * * The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party may controvert this presumption, and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand."

[1] Cox *v.* National Bank, 100 U. S. 713; State Bank *v.* Hurd, 12 Mass. 171; Thompson *v.* Ketchum, 4 Johns. 285; Meyer *v.* Hibscher, 47 N. Y. 265; Brett's Exrs. *v.* Bank of the Metropolis, 1 Pet. 92, Marshall, C. J., saying: "The plaintiffs in error contend that the testimony ought not to have been admitted, because it was an attempt by parol proof to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and a necessity of a demand on the person, when the parties are

place of payment has been agreed upon, presentment should be made at that place; and such presentment is sufficient, although the maker or acceptor cannot be found at that place.[1]

Where the paper is made payable at either of two or more places, presentment may be made at either place, and one such presentment is sufficient to bind the drawer and indorsers.[2] The same conclusion is reached, where the paper is "payable at any bank" in a certain place.[3] So,

silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker, and this does not alter the instrument so far as it goes, but supplies extrinsic circumstances which the parties are at liberty to supply. No demand is necessary to sustain a suit against the maker. His undertaking is unconditional; but the indorser undertakes conditionally to pay, if the maker does not, and this imposes on the holder the necessity of taking proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon extrinsic circumstance, and substitute that agreement for an act which the law prescribes only when they are silent."

[1] Sussex Bank *v.* Baldwin, 2 How, 487; Brent's Exrs. *v.* Bank of Metropolis, 1 Pet. 92; Eason *v.* Isbell, 47 Ala. 456; Cox *v.* National Bank, 100 U. S. 716; Hawkey *v.* Borwick, 4 Bing. (13 Eng. C. L.) 136; Root *v.* Franklin, 3 Johns. 207; Buxton *v.* Jones, 1 M. & G. 83; DeBergarsche *v.* Pillin, 3 Bing. 476; Troy City Bank *v.* Lauman, 19 N. Y. 477. The death of the acceptor or maker before maturity does not affect the right of the holder to make presentment at the designated place. Philpot *v.* Bryant, 3 C. & P. 246; *s. c.* 4 Bing. 717.

[2] Beeching *v.* Gower, 1 Holt, 313; Story on Notes § 231; Story on Bills, § 354; Daniel's Negot. Inst., § 648.

[3] Page *v.* Webster, 15 Me. 249; Langley *v.* Palmer, 30 Me. 467; Malden Bank *v.* Baldwin, 13 Gray, 154; Brickett *v.* Spalding, 33 Vt. 109; Freeman's Bank *v.* Ruckman, 16 Gratt. 126; Boit *v.* Corr, 54 Ala. 113; Jackson *v.* Packer, 13 Conn. 342. Although it was once held to be the duty of the holder to give notice to the maker or acceptor, at which bank the paper was placed (North Bank *v.* Abbott, 13 Pick. 465), it is now definitely determined to be the duty of the maker or acceptor to tender payment at all of the banks, in order to find the paper. Page *v.*

also, where the drawee or acceptor resides in one place, and the bill is payable in another place, as long as the drawee has not accepted it, it may be presented at either place.[1] And if the bill has been accepted *supra protest*, demand should be made of the drawee at the place where he resides.[2]

After determining in what city, town or village the presentment should be made, it becomes necessary to ascertain whether the presentment should be made at the residence or place of business of the maker or acceptor. If the presentment is made to the maker or acceptor in person, and he refuses payment without any objection as to the place of presentment, it does not matter where the presentment is made.[3] But in order that the

Webster, 15 Me. 24; Jackson *v.* Packer, 13 Conn. 342; Malden *v.* Baldwin, 13 Gray, 154. But the office of a private banker does not come within the terms of an instrument "payable at any bank." Way *v.* Butterworth, 108 Mass. 509.

[1] Thus where a bill drawn in Liverpool and payable in London, was protested for both non-acceptance and non-payment in Liverpool, where the drawee resided, Kent, C. J., said; "A general refusal to pay was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in London. We do not mean to say that the demand for payment at Liverpool was indispensable. The bill being payable at London, it would have been sufficient for the holder to have been there when the bill fell due, ready to receive payment. In the present case, a protest at London or a demand and protest at Liverpool, were sufficient and the holder might take either course." Mason *v.* Franklin, 3 Johns. 202.

[2] Mitchell *v.* Barney, 10 B. & C. 6, 7.

[3] King *v.* Crowell, 61 Me. 244; Baldwin *v.* Farnsworth, 1 Fairf. 414; 1 Parsons' N. & B. 421; King *v.* Holmes, 11 Pa. St. 456, Rogers, J., saying: "The court correctly instructed the jury that a demand in the street of an acceptor of a bill of exchange is not a sufficient demand; that when a bill is payable generally, and not at a particular place, the demand must be at the place of business of the acceptor. But if the notary, on his way to the place of business of the acceptor, meets him on the street, and informs him of his business and where he is going, and the acceptor offers, if he will go to his place of business, to give him only a check on a broker, it is not necessary for the notary to proceed further. The de-

presentment for payment may be sufficient, without being made to the maker or acceptor in person, it must be at the usual place of business, or residence, where one has a permanent, or usual place of business, even though it be only desk-room in another's office: it is certainly sufficient to bind indorsers and the drawer, if presentment is made there, even though the maker or acceptor is absent.[1] And it is doubtful whether under such circumstances a presentment at the residence during business hours would be sufficient, since a man of business is not expected to be found at home during those hours.[2] But it must be a permanent place of business, and one where he is accustomed to receive presentments for payment.[3]

If the maker or acceptor has two places of business, and

mand at the place of business is waived by the payor or acceptor. It is, in effect, a refusal to pay, for an offer to pay by a check on a broker, in legal contemplation, is nothing. It is not such a tender as the notary would be justified in accepting. In this case, the acceptor had no cause of complaint, for the notary offered to receive a check on one of the banks in payment of the bill." Gates *v.* Beecher, 60 N. Y. 522, Folger, J.: "Demand of payment, at the usual place of business, of the maker, though he be absent, is sufficient; or at his residence; or to him in person."

[1] Lanussa *v.* Massicot, 3 Mart. (La.) 361; Sussex Bank *v.* Baldwin, 2 Harr. 487; West *v.* Brow, 6 Ohio St. 542; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514; Williams *v.* Hoogewerff, 25 Md. 128.

[2] 1 Parsons' N. & B. 423; Lanussa *v.* Massicot, 3 Mart. (La.) 361.

[3] "I have no doubt where a person has an office, or known and settled place of business for the transaction of his moneyed concerns, whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, as well as a presentment and demand at his residence, is sufficient. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or workshop would not. Yet if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there." Sussex *v.* Baldwin, 2 Harr. 487.

neither one is specified as the place of payment, presentment must be made at both places, if the maker or acceptor is not found in the first presentment.[1]

But if the place of business cannot be found, or the maker or acceptor has no place of business for the transaction of financial matters, demand must be made at the residence.[2] And where the place of business has been abandoned, it will not be enough to make presentment at the old place of business.[3] But if it is not abandoned, it is the duty of the proprietor to keep it open on business days during the hours of business, and if he does not, the holder of a bill or note against him need not hunt for him elsewhere. At least this is the ruling of some of the cases, and may be taken as supported by the weight of authority.[4] And this is also the rule, where a place of payment is specially designated in the instrument; for example, where it is made

[1] Brooks *v.* Higby, 18 N. Y. S. C. (11 Hun) 236, Smith, J., saying: "As it appeared that the acceptor had two places of business in St. Louis, the certificate furnished no evidence whatever that the presentment and demand were made at the place where the draft was payable. The proof was fatally defective."

[2] Jarvis *v.* Garnett, 39 Mo. 271; Packard *v.* Lyon, 5 Duer, 82; Sanderson *v.* Judge, 2 H Bl. 509; Stevers *v.* Prentice, 3 B. Mon. 561; Shamburgh *v.* Comagere, 10 Mart. (La.) 18; M'Gruder *v.* Bank of Washington, 9 Wheat. 198.

[3] Granite Bank *v.* Ayers, 16 Pick. 392; Talbot *v.* Nat. Bank, 129 Mass. 67.

[4] Wiseman *v.* Chiapella, 23 How. 368; Baumgardner *v.* Reeves. 35 Pa. St. 250; Shed *v.* Brett, 1 Pick. 413; Watson *v.* Templeton, 11 La. Ann. 137; Berge *v.* Abbott, 83 Pa. St. 159; Bynum *v.* Apperson, 9 Heisk. 625; John *v.* City Nat. Bank, 62 Ala. 529. But see *contra* Ellis *v.* Commercial Bank, 7 How. (Miss.) 294; Otto *v.* Belden, 28 La. 305. In Wiseman *v.* Chiapella, *supra*, Wayne, J., said: "Cases can be found, and many of them, in which further inquiries than a call at the place of business of a merchant acceptor have been deemed proper, and in which such inquiries, not having been made, have been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to have been made on account of peculiar facts in them which do not exist in this case."

payable at a bank. If the bank or other place of payment is closed on the day that the paper falls due, the holder is not bound to hunt up the maker or acceptor, at his place of business or at his residence, for the purpose of making presentment.[1] But if the business of the bank or banker has been transferred to a successor, doing business at the same place, it is necessary to present for payment to the succeeding bank or banker.[2]

If the holder does not know where to find the maker or acceptor, he must make the most diligent inquiry, before dishonoring the paper by protest for non-payment; and he must pursue the inquiry, as long as he does not obtain some definite information as to the whereabouts of the maker or acceptor.[3] But if, after every reasonable diligence has been used to ascertain the domicile of the maker or acceptor, it is impossible to find him, presentment will be excused, and the indorsers and drawer may then be required to pay.[4]

§ 315. **The time of presentment — Days of grace.** — In order to hold the drawer and indorsers, it is necessary to

[1] Central Bank *v.* Allen, 16 Me. 41; Apperson *v.* Bynum, 5 Cold. 349; Hine *v.* Allely, 4 B. & Ad. 624; Sands *v.* Clarke, 19 L. J. C. P. 84; Rogers *v.* Langford, 1 C. & M. 637. See Howe *v.* Bowes, 16 East, 112; 5 Taunt. 30; Erwin *v.* Adams, 2 La. 318; Lane *v.* Bank of W. Tenn., 9 Heisk. 419.

[2] Central Bank *v.* Allen, 16 Me. 41; Berg *v.* Abbott, 83 Pa. St. 158; DeWolf *v.* Murray, 2 Sand. 166; Bynum *v.* Apperson, 9 Heisk. 637; Sanderson *v.* Oakey, 14 La. 373; Roberts *v.* Mason, 1 Ala. 373.

[3] Grafton Bank *v.* Cox, 13 Gray, 505; Porter *v.* Judson, 1 Gray, 175; Wheeler *v.* Field, 6 Met. 290; Hill *v.* Varnell, 2 Greenl. 233; Gilchrist *v.* Donnell, 53 Mo. 591. In Grafton Bank *v.* Cox, *supra*, Merrick, J., said: "If the maker had at the maturity of the note resided in Boston, or in the State, or at any place to which the holder would have been bound to resort to demand payment of him, and there was reason to suppose that the indorser had knowledge of such residence, the omission to inquire of him concerning it would have been a failure to use diligence, and would have had the effect to discharge the indorsee from his liability."

[4] Moore *v.* Coffield, 1 Dev. 247; Taylor *v.* Snyder, 2 Den. 145.

present the paper for payment on the day of maturity. And presentment before or after the day of maturity will not be sufficient, unless the holder has some valid excuse for not making the presentment on the exact day of maturity.[1] If the paper is payable in installments, then presentment must be made when each installment falls due; unless it is agreed in the instrument that if one installment is not paid, the whole debt becomes due, when the one presentment suffices.[2]

Commercial paper is usually made payable on a certain day, a certain time after date or after sight, at sight, or on demand. And where no time of payment is stated in the paper, it is payable on demand.[3]

But these statements must be taken with the qualification rendered necessary by the allowance of days of grace. Instead of being payable on the day named in the paper, or at the time computed from the date given in the paper, it is really payable three days after such time. This rule grew out of an old mercantile custom, of allowing drawees three days in which to make arrangement for the payment of foreign bills, particularly where the drawee had been taken somewhat by surprise. This indulgence was, however, at first a matter of grace, and could not be demanded by the obligor as a matter of common right.[4] But the custom was so universally observed and practiced, that the allowance of three days has become in the course of time a

[1] Robinson *v.* Blen, 20 Me. 109; Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Windham Bank *v.* Norton, 22 Conn. 213; Griffin *v.* Goff, 12 Johns. 423; Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Pendleton *v.* Knickerbocker Life Ins. Co., 7 Fed. Rep. 170.

[2] Oridge *v.* Sherborne, 11 M. & W. 374; 1 Parsons' N. & B. 374.

[3] Whitlock *v.* Underwood, 2 B. & C. 157; Michigan Ins. Co. *v.* Leavenworth, 30 Vt. 11; Thompson *v.* Ketcham, 8 Johns. 189; Cornell *v.* Moulton, 3 Denio, 12; Bowman *v.* McChesney, 22 Gratt. 609; Piner *v.* Clary, 17 B. Mon. 663.

[4] Chitty on Bills (13 Am. ed.) [*374] 422; 1 Daniel's Negot. Inst., § 614.

fixed and common right of the drawee.[1] It was doubtful at one time whether days of grace were allowed on inland bills and promissory notes.[2] But it is now definitely settled that no such distinction is made, and that days of grace are generally allowed to all classes of bills of exchange and to promissory notes.[3] Wherever grace is allowed, demand must be made on the last day of grace, and presentment on any other day will, as a rule, not suffice.[4] While days of grace are very generally allowed to commercial paper, bills and notes, payable on demand, are not entitled to them.[5] Though there is some disposition to hold that paper payable at sight was not entitled to grace,[6] the better opinion is that such paper is entitled to days of grace.[7]

If the paper is payable in installments, grace will be al-

[1] Bank of Washington *v.* Triplett, 1 Pet. 25; Ogden *v.* Saunders, 12 Wheat. 213.

[2] Cramlington *v.* Evans, 2 Vent. 307; Tassell *v.* Lewis, 1 Ld. Raym. 743; May *v.* Cooper, Fortescue, 376; Dexlaux *v.* Hood, Buller N. P. 274; Jones *v.* Fales, 4 Mass. 245; Harrell *v.* Bixler, Walk. 176; Cook *v.* Gray, Hempstead C. C. 47.

[3] Brown *v.* Harraden, 4 T. R. 148; Leftly *v.* Mills, 4 T. R. 170; Ogden *v.* Saunders, 12 Wheat. 213; Cook *v.* Darling, 2 R. I. 385; Beck *v.* Thompson, 4 Harr. & J. 531; Norton *v.* Lewis, 2 Conn. 478; Hudson *v.* Matthews, Morris (Iowa), 94; Green *v.* Raymond, 9 Neb. 299; Crenshaw *v.* M'Kiernan, Minor, 295.

[4] Bank of Washington *v.* Triplett, 1 Pet. 25; Donegan *v.* Wood, 49 Ala. 242. Interest is also computed to the last day of grace. Bank of Utica *v.* Wager, 2 Cow. 712; Ogden *v.* Saunders 12 Wheat. 213.

[5] Oridge *v.* Sherborne, 11 M. &. W. 374; Woodruff *v.* Merchants' Bank, 25 Wend. 673; Barbour *v.* Bayen, 5 La. Ann. 303; First Nat. Bank *v.* Price, 52 Iowa, 570; Cammer *v.* Harrison, 2 McCord, 246.

[6] Dalton City Bank *v.* Haddock, 54 Ga. 584; Janson *v.* Thomas, 3 Dougl. 421; Trask *v.* Martin, 1 E. D. Smith, 505. In Missouri it is held that sight drafts are by statute deprived of grace. Lucas *v.* Ladero, 28 Mo. 342.

[7] Crenshaw *v.* M'Kiernan, Minor, 295; Hart *v.* Smith, 15 Ala. 807; Cribbs *v.* Adams, 13 Gray, 597; Thornburgh *v.* Emmons, 23 W. Va. 325; Knott *v.* Venable, 42 Ala. 186; Craig *v.* Price, 23 Ark. 634; Walsh *v.* Dart, 12 Wis. 635; Webb *v.* Fairmaner, 3 M. & W. 473; Dixon *v.* Nuttall, 1 Cromp. M. & R. 307; Coleman *v.* Sayer, 1 Barn. 303.

lowed in the payment of each installment.[1] The law merchant generally limits the allowance of grace to three days, of which the courts will take judicial notice.[2] But it is a matter of local custom, and a different number of days may be determined upon; as, for example, four days of grace were formerly allowed by custom in the District of Columbia, and ten days in Louisiana.[3] As soon as a different customary allowance of grace is recognized by decision, it becomes a law, and there is no need of special proof of the varying custom.[4] But before receiving such judicial sanction, such proof is necessary, and the custom should be shown as prevailing in a place, rather than at a particular bank.[5] It is not necessary in such a case to show that the custom was known to the person transacting banking business at that place.[6]

It is to be further noticed, that days of grace are only allowed, where the instruments of indebtedness are negotia-

[1] Bridge *v.* Sherborne, 11 M. & W. 374. But this is not true of installments of interest, Macloon *v.* Smith, 49 Wis. 200.

[2] Renner *v.* Bank of Columbia, 9 Wheat. 581; Mills *v.* Bank of United States, 11 Wheat. 431; Wood *v.* Corl, 4 Met. 203; Jackson *v.* Henderson, 3 Leigh, 197; Bank of Columbia *v.* Magrader, 6 Har. & J. 172; Lucas *v.* Laders, 28 Mo. 242; Reed *v.* Wilson, 41 N. J. L. 29; Dollfus *v.* Frosch, 1 Den. 367.

[3] Miller *v.* Bank of United States, 11 Wheat. 431; Dubreys *v.* Farmer, 22 La. Ann. 478; Renner *v.* Bank of Columbia, 9 Wheat. 581; Wood *v.* Corl, 4 Met. 203; City Bank *v.* Cutter, 3 Pick. 414; Kilgore *v.* Bulkley, 14 Conn. 362; Jackson *v.* Henderson, 3 Leigh, 197; Adams *v.* Otterback, 15 How. 539; Bank of Columbia *v.* Magrader, 6 Har. & J. 172. But see Woodruff *v.* Merchants' Bank, 25 Wend. 673; 6 Hill, 174; Bowen *v.* Newell, 4 Seld. 190.

[4] Cookendorfer *v.* Preston, 4 How. 317; Edie *v.* East India Co., 2 Burr. 1221.

[5] Renner *v.* Bank of Columbia, 9 Wheat. 587; Mills *v.* Bank U. S., 11 Wheat. 431; Adams *v.* Otterback, 15 How. 539; Dorchester, etc., Bank *v.* Milton Bank, 1 Cush. 177.

[6] Mills *v.* Bank of United States, 11 Wheat. 431; Fowler *v.* Branily, 14 Pet. 318; Lime Rock Bank *v.* Hewett, 52 Me. 531.

ble.[1] The parties may at any time stipulate that the note or bill is to be paid without an allowance of days of grace, and in such a case, the paper will be payable without grace.[2]

§ 316. **Computation of time — Effect of legal holidays.** — In all computation of the time of payment of commercial paper, the day of date is excluded. If the paper is payable in one or more years from date, no difficulty is ever experienced in ascertaining its day of maturity. The first or other subsequent anniversary of the date would be the day of maturity, unless days of grace are allowed, when the day of maturity will be three days after such anniversary of the date.

If the unit of time employed in a commercial instrument be a month, it is construed to be a calendar month, and not a lunar month.[3] Some peculiar results are attained, arising out of the variable duration of the calendar month. If the paper is dated the first or last day of a month, and payable in a given number of months, it will be payable on the first or last day of the month respectively. For example, a note made February first and payable one month from date will (grace included) be due on the fourth of March. And if two notes be dated respectively thirty-first of January, and twenty-eighth of February, each payable one month after date, they will be due, respectively (grace included), on the third of March, and the third of April. But if the date be any other but the first and last day of the month, the paper will fall due on the same day, days of

[1] Backus *v.* Danforth, 10 Conn. 297; Avery *v.* Stewart, 10 Conn. 69; Lamkin *v.* Nye, 43 Miss. 241.

[2] Perkins *v.* Franklin Bank, 21 Pick. 483; Dumford *v.* Patterson, 7 Mart. (La.) 460. But the intention to disallow grace must be clear. McDonald *v.* Lee, 12 La. 435; Perkins *v.* Franklin Bank, *supra.*

[3] Lang *v.* Gale, 1 Maule & S. 111; Matter of Swonford, 6 Maule & S. 226; Thomas *v.* Shoemaker, 6 Watts & S. 179; McMurchey *v.* Robinson, 10 Ohio, 496.

grace not included. For example, a note dated January 16th, payable one month after date, will fall due (grace included) on the nineteenth of February. And where there is no corresponding day in the month in which the paper is to fall due, the nearest day will be the day of maturity. Thus, a note dated twenty-ninth or thirtieth of January and payable one month after date, will be due (grace excluded), twenty-eighth of February; unless it be a leap year, when it will be due the twenty-ninth of February.[1]

If the paper is payable in a given number of days "after date," "after sight" or "after demand," the day of date, of sight or of demand, is excluded, and the day of payment is included. For example, if the paper is payable thirty days after date, and the paper was dated January first, it would fall due (grace included) on the third of February; and if the paper was dated February first, it would be due (grace included), on the sixth of March, except in leap-year, when the day of payment would be the fifth of March.[2]

The object of the date of commercial paper is principally to fix the day of maturity, and the day of maturity will be computed from the given date, whether the paper was delivered before or after that date.[3] If the date is not given in the paper, or is an impossible one, the computation is made from the day of delivery;[4] and if the day of de-

[1] Wagner *v.* Kenner, 2 Rob. (La.) 120; Roehner *v.* Knickerbocker Life Ins. Co., 63 N. Y. 163; Hartford Bank *v.* Barry, 17 Mass. 94; Wood *v.* Muller, 3 Rob. (La.) 299; Ripley *v.* Greenleaf, 2 Vt. 129; 1 Daniel's Negot. Inst. §§ 624, 625; Story on Notes, § 213*a*; Story on Bills, § 330.

[2] Henry *v.* Jones, 8 Mass. 453; Ammidown *v.* Woodman, 31 Me. 580; Coleman *v.* Sayer, 1 Barn. 303; Sturdy *v.* Henderson, 4 B. & Ald. 592; Lester *v.* Garland, 15 Ves. 248; Hill *v.* Norvell, 3 McLean, 883; Loring *v.* Halling, 15 Johns. 120; Taylor *v.* Jacoby, 2 Pa. St. 495; Mitchell *v.* De Grand, 1 Mason, 176; Barlow *v.* Planters' Bank, 9 How. (Miss.) 129.

[3] Powell *v.* Waters, 8 Cow. 699; Brewster *v.* McCardle, 8 Wend. 478. Parol evidence is not admissible to vary the date. Huston *v.* Young, 33 Me. 85.

[4] Mechanics' Bank *v.* Schuyler, 7 Cow. 337.

livery cannot be proved, then from the time when it appears first to have been in existence.[1]

If paper falls due on a Sunday or other legal holiday, presentment for payment cannot be made on that day, for by the law all banking business is then suspended. If the days of grace are not allowed, and the holiday is the actual day of maturity of the paper, and not the last day of grace, since the maker or acceptor cannot be compelled to pay sooner than he had promised to pay, demand would have to be made on the next succeeding business day.[2] But if the days of grace are allowed, and the last day of grace is a holiday, the demand should be made on the day preceding, the second day of grace; and if the two holidays come together, taking up the second and third days of grace, demand should still be made on the day preceding, viz., on the first day of grace. This rule is the survival of the original character of the allowance of days of grace, when they were indeed days of grace, not to be demanded as a matter of right, but to be received as a matter of grace. Being an act of indulgence, the maker or acceptor could not require the holder to increase or extend it.[3]

If the holiday does not fall on the last day, it is counted in the computation of time, as if it had been a business day.

[1] Mahier *v.* LeBlanc, 12 La. Ann. 207.

[2] Avery *v.* Stewart, 2 Conn. 69; Colms. *v.* Bank, 4 Baxt. 422; Salter *v.* Burt, 20 Wend. 205; Sands *v.* Lyon, 18 Conn. 18; Barrett *v.* Allen, 10 Ohio, 426; Staples *v.* Franklin Bank, 1 Met. 43; Kuntz *v.* Tompel, 48 Mo. 75.

[3] Bussard *v.* Levering, 6 Wheat. 192; Shepard *v.* Hall, 1 Conn. 329; Kilgore *v.* Bulkley, 14 Conn. 362; Reed *v.* Wilson, 41 N. J. L. 29; Sheppard *v.* Spates, 4 Md. 400; Barrett *v.* Allen, 10 Ohio, 426; Tassell *v.* Lewis, 1 Ld. Raym. 743; Woolley *v.* Clements, 11 Ala. 220; Morris *v.* Richards, 45 L. T. R. (N. S.) 210; Lewis *v.* Burr, 2 Caines, 195; Barlow *v.* Gregory, 31 Conn. 261; Kuntz *v.* Tempel, 48 Mo. 75; Story on Bills, § 338; Sheldon *v.* Benham, 4 Hill, 129; Adams *v.* Otterback, 15 How. 539; Farnum *v.* Fowle, 12 Mass. 89; Mechanics', etc., Bank *v.* Gibson, 7 Wend. 460.

This is also true, where the holiday is the first or second day of grace.[1] The courts will take judicial knowledge of the dates on which the holidays fall.[2]

What are legal holidays are regulated by statute in the different States. Generally, they include Sundays, Christmas day, Fourth day of July, Thanksgiving Day; and sometimes the twenty-second of February, New Year's day and Good Friday, are included. Laws, which declare the suspension of business on legal holidays, have been questioned as being an unconstitutional impairment of the obligation of the contract, where payment is postponed to the next day.[3] But the contrary has been generally maintained.[4] Where the observance of a holiday is a local custom, not sanctioned by law, the demand on a preceding day would not bind the indorser, unless the custom was known to him and the other parties to the instrument.[5]

§ 317. **At what hour of the day presentment should be made.** — If the paper is payable generally, demand of payment must be made at the place of business or residence of the maker or acceptor. If it is made at the place of business it must be made during the ordinary business hours.[6] But if there is some one present at the place of business, when the demand is made, who was authorized to make payment,

[1] Woolley *v.* Clements, 11 Ala. 229.

[2] Reed *v.* Wilson, 41 N. J. L. 29.

[3] Duerson's Admr. *v.* Alsop, 27 Gratt. 238.

[4] Barlow *v.* Gregory, 31 Conn. 261.

[5] City Bank *v.* Cutter, 3 Pick. 414; Dabney *v.* Campbell, 9 Humph. 680; Mills *v.* Bank of United States, 11 Wheat. 430.

[6] Lunt *v.* Adams, 17 Me. 230; Dana *v.* Sawyer, 22 Me. 244; Morgan *v.* Davison, 1 Stark. 114; MacFarland *v.* Pico, 8 Cal. 626; Tuggs *v.* Neuanhahn, 1 C. & P. 631; Wallace *v.* Crilleo, 46 Wis. 577. But in order to determine what are the ordinary hours of business in the place of payment, reference is to be made to the general hours of business of that place, and not to the hours of business of a particular calling or trade. Thompson on Bills, 302; 1 Daniel's Negotiable Inst., § 601.

and who refuses to pay, it would be a good presentment, although made after business hours.[1]

Where the demand may be made at the dwelling of the maker or acceptor, it must be made at some reasonable hour, when one is not accustomed to retire to bed, and when one may be expected to receive a visitor.[2] But a demand at any time of the day will be good, if made upon the maker or acceptor personally, even though he gets up out of the bed to answer the call.[3]

If the paper is payable at a particular bank, then presentment must be made during banking hours.[4] But if made after banking hours to the officers of the bank, who are authorized to make payment, it will be sufficient.[5] The maker or acceptor has the whole day in which to make payment; but ordinarily he cannot compel the holder to make a second demand on him, if a demand had been already made earlier in the day. In such a case the maker must go and tender payment.[6] But some-times, by local

[1] Henry *v.* Lee, 2 Chitty's Rep. 125; Garnett *v.* Woodcock, 1 Stark. 475; 1 Parsons, 420.

[2] Stivers *v.* Prentice, 3 B. Mon. 461; Nelson *v.* Fotterall, 7 Leigh, 179; Skelton *v.* Dusten, 92 Ill. 49; Barclay *v.* Bailey, 2 Campb. 527; Dana *v.* Sawyer, 22 Me. 244.

[3] Farnsworth *v.* Allen, 4 Gray, 453; 1 Parsons, 417.

[4] Elford *v.* Teed, 1 Maule & S. 28; Parker *v.* Gordon, 7 East, 385; Reed *v.* Wilson, 12 Vroom, 29; Staples *v.* Franklin Bank, 1 Met. 43; Thorpe *v.* Pecks, 28 Vt. 127.

[5] Bank of Utica *v.* Smith, 18 Johns. 230; Bank of Syracuse *v.* Hollister, 17 N. Y. 46; Salt Springs Nat. Bank *v.* Burton, 58 N. Y. 432; Flint *v.* Rogers, 15 Me. 57; Reed *v.* Wilson, 41 N. J. L. 29; Cohen *v.* Hunt, 2 Smed. & M. 227; Goodloe *v.* Godley, 13 Smed. & M. 227; First. Nat. Bank *v.* Owen, 23 Iowa, 185; Commercial Bank *v.* Hamer, 7 How. (Miss.) 448; Barbaroux *v.* Waters, 3 Met. (Ky.) 304; Newark Rubber Co. *v.* Bishop, 3 E. D. Smith, 48; Thomas *v.* Marsh, 2 La. Ann. 353; Shepherd *v.* Chamberlain, 8 Gray, 225; Crook *v.* Jadis, 6 C. & P. 191. But if made to an unauthorized agent, or to an authorized agent on the street, the presentment is insufficient. Newark Rubber Co. *v.* Bishop, *supra;* Swan *v.* Hodges, 3 Head, 251.

[6] 1 Parsons, 374.

usage, it is required that a bill or note, payable in a bank, shall be kept there all day, so that the maker or acceptor may pay it at any hour of the day. Where such is the custom, there has not been sufficient presentment, if the paper has been taken away before the close of banking hours.[1]

If a paper is payable "at bank" and not at a particular bank — the general banking hours, observed at the place of payment, and not the hours of a particular bank, will be considered in determining the hour when presentment should be made.[2] The courts will take judicial notice of the banking hours of any large city lying within the jurisdiction of the court, in which the action has been brought. In all other cases, it is likely that proof would be required.[3]

§ 318. **Mode of presentment.** — When the presentment is made, the paper should itself be exhibited, in order that the promisor may inspect it, if he desires, and obtain possession of it, as soon as he pays it. And while an actual exhibition of the paper may perhaps not be required, the demand must be accompanied by some statement or indication that the paper is in the actual possession of the person who is making the presentment.[4] But if the maker or acceptor states his inability to pay, and does not demand the exhibition of the paper, a more formal presentment will be considered as having been waived.[5] If the paper

[1] Planters' Bank *v.* Markham, 5 How. (Miss.) 397; Harrison *v.* Crowder, 6 Smed. & M. 464.

[2] United States Bank *v.* Carneal, 2 Pet. 543; Church *v.* Clark, 21 Pick. 310.

[3] Morse on Banking, 371.

[4] Musson *v.* Lake, 4 How. 262; Freeman *v.* Boynton, 7 Mass. 483; Shaw *v.* Reed, 12 Pick. 132; Arnold *v.* Dresser, 8 Allen, 435; Posey *v.* Decatur Bank, 12 Ala. 802; Draper *v.* Clemens, 7 Mo. 52; Smith *v.* Gibbs, 2 Smed. & M. 479; Nailor *v.* Bowie, 3 Md. 251; Etheridge *v.* Ladd, 44 Barb. 69; Crandall *v.* Schroeppel, 1 Hun, 557.

[5] King *v.* Crowell, 61 Me. 244; Lockwood *v.* Crawford, 18 Conn. 361; Gilbert *v.* Dennis, 3 Metc. 495; Fall River Union Bank *v.* Willard, 5 Metc. 216.

is payable at a bank, it will be sufficient that the paper is at the bank in the possession of one who is entitled to receive payment. An exhibition of the paper to the promisor will not be required, unless he demands it.[1] And where the paper is the property of the bank, at which it is payable, it is presumed that the bank has possession of it, until the contrary is proved.[2]

It has also become an established usage in some States, for the bank which holds the paper to give notice to the promisor a few days before maturity, that his paper is at the bank and will be due on a certain day. This notice is by usage made to answer the more formal presentment on the day of maturity. Where the paper is payable at the bank, since no formal presentment is required, there can be no objection to this preliminary notice.[3] But it has been held that this preliminary notice will take the place

[1] Fullerton *v.* Bank of United States, 1 Pet. 604; Bank of United States *v.* Carneal, 2 Pet. 543; Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641; Huffaker *v.* National Bank, 13 Bush, 649; Graham *v.* Sangston, 1 Md. 68; People's Bank *v.* Brooks, 31 Md. 7; Folger *v.* Chase, 18 Pick. 63; Berkshire Bank *v.* Jones, 6 Mass. 524; Woodin *v.* Foster, 16 Barb. 146; Nichols *v.* Goldsmith, 7 Wend. 160; Ward *v.* Northern Bank, 14 B. Mon. 351; Apperson *v.* Union Bank, 4 Cold. 445; Goodloe *v.* Godley, 13 Smed. & M. 233; State Bank *v.* Napier, 6 Humph. 270; Allen *v.* Miles, 4 Harr. 234; Saunderson *v.* Judge, 2 H. Bl. 509; Reynolds *v.* Chettle, 2 Camp. 596; Merchants' Bank *v.* Elderkin, 25 N. Y. 178; Gillett *v.* Averill, 5 Den. 85. But it is necessary that some one at the bank is aware of the presence of the paper in the bank. It will not be sufficient, if the paper has been mailed by the holder to the cashier, and the envelope containing the paper has slipped through a crack in the cashier's desk, before he has become aware of its contents. Chicopee Bank *v.* Philadelphia Bank, *supra*.

[2] Fullerton *v.* Bank United States, 1 Pet. 604; Bank of United States *v.* Carneal, 2 Pet. 543; Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641; Berkshire Bank *v.* Jones, 6 Mass. 324; Folger *v.* Chase, 18 Pick. 63; Seneca Co. Bank *v.* Neass, 5 Den. 329; State Bank *v.* Napier, 6 Humph. 270.

[3] Camden *v.* Doremus, 3 How. 515; Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Lincoln & Kennebec Bank *v.* Hemmatt, 9 Mass. 159.

of the formal presentment on the day of maturity, even where the paper is payable generally, instead of at a particular bank.[1] It has been held that the drawer and indorsers must know of the usage, in order that they will be bound by this method of preliminary notice and demand.[2] But where the paper is payable at a particular bank, the parties to it must be presumed to have intended "to be governed by the usage of the bank at which they have chosen to make the security itself negotiable."[3] But this preliminary notice must be a prevalent custom of the place, and not a usage of that particular bank, in order that it may bind parties ignorant of its existence.[4]

The demand should not vary from the tenor of the paper. If it is payable generally, it will not be a good presentment if gold be demanded.[5]

[1] Jones *v.* Fales, 4 Mass. 245; Widgery *v.* Munroe, 6 Mass. 449; Weld *v.* Gorham, 10 Mass. 366; Whitewell *v.* Johnson, 17 Mass. 449; Mechanics' Bank *v.* Merchants' Bank, 6 Metc. 24; Grand Bank *v.* Blanchard, 23 Pick. 505; Marine Bank *v.* Smith, 18 Me. 99; Gallagher *v.* Roberts, 11 Me. 489. But see *contra* Moore *v.* Waitt, 13 N. H. 415; Barnes *v.* Vaughan, 6 R. I. 259; Pearson *v.* Bank of Metropolis, 1 Pet. 89; Farmers' Bank *v.* Duvall, 7 Gill & J. 78. This has been very properly characterized as a provisional custom. 2 Ames on B. & N. 682.

[2] Leavitt *v.* Times, 3 N. H. 14.

[3] Mills *v.* Bank of United States, 11 Wheat. 431.

[4] Dorchester, etc., Bank *v.* Milton, 1 Cush. 177; Adams *v.* Otterback, 15 How. 539.

[5] Langerberger *v.* Kroeger, 48 Cal. 147.

CHAPTER XVI.

PROTEST.

SECTION 321. The object and necessity of protest.
322. By whom protest should be made.
323. Where protest should be made.
324. By whom should presentment be made in preparation for protest.
325. Noting the dishonor and extending the protest.
326. The contents of certificates of protest.
327. Protest, evidence of what.

§ 321. **The object and necessity of protest.** — The protest is intended to furnish to the holder legal testimony of the fact that the required presentment and demand of payment has been made, and notice of dishonor given to be used in an action for the face value of the paper against the drawer and indorsers.[1] The protest by a notary does away with the necessity of proving these various required acts by witnesses in open court. Where all the witnesses live within the jurisdiction of the court, as is the usual case with inland bills of exchange, the difficulty of proving these facts by the examination of witnesses is not so great, although the expense of this method of proof may be greater, particularly where the witnesses do not reside in the same place, although within the jurisdiction of the court. But where they reside beyond the State, as where the instrument is a foreign bill of exchange, they cannot be compelled to testify; and unless there was some other method of proving these necessary facts, the holder of a foreign bill is in danger of failing to establish his claim of exoneration

[1] Swayne *v.* Turner, 17 Kan. 629; Walker *v.* Turner, 2 Gratt. 536.

against the drawer and indorsers. For this reason, it has been a universal rule of the law merchant in England and the United States, that in order that the drawer and indorsers of a foreign bill of exchange may be held liable, the holder must protest the bill for non-payment. But in the absence of statutes to the contrary, it is not necessary to protest domestic paper.[1] The protest is so indispensable to a foreign bill of exchange, in case of non-payment, that no other evidence will supply the place of it. It has become an organic part of the bill itself.[2]

As long as a promissory note has not been indorsed, there is no need of proof of presentment for payment and notice of dishonor, and consequently no need of protest. But as soon as a foreign note has been indorsed, and presentment and notice of dishonor become necessary, in order to hold the indorser, it has been held that the protest of foreign notes will also be required, on the ground that the indorsement of a note is essentially a bill drawn by the payee on the maker.[3]

[1] Orr *v.* Maginnis, 7 East, 359; Leftly *v.* Mills, 4 T. R. 170; Gale *v.* Walsh, 5 T. R. 239; Borough *v.* Perkins, 1 Salk. 131; Young *v.* Bryan, 6 Wheat. 146; Union Bank *v.* Hyde, 6 Wheat. 372; Burke *v.* McKay, 2 How. 66; Bailey *v.* Dozier, 6 How. 23; Bank of United States *v.* Leathers, 10 B. Mon. 64; Phœnix Bank *v.* Hussey, 12 Pick. 483; Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Hubbard *v.* Troy, 2 Ired. 134; Green *v.* Louthain, 49 Ind. 139; McMarchey *v.* Robinson, 10 Ohio St. 496; Smith *v.* Curlee, 102 Mass. 141. According to the law of most foreign nations, the protest is necessary in the event of the dishonor of any bill. Thompson on Bills (Wilson's ed.), 307.

[2] Union Bank *v.* Hyde, 6 Wheat. 572; Borough *v.* Perkins, 1 Salk. 121; 2 Ld. Raym. 992; Carter *v.* Union Bank, 7 Humph. 548; Chitty on Bills (13 Am. ed.), [*333] 373.

[3] Carter *v.* Burley, 9 N. H. 558; Smith *v.* Little, 10 N. H. 826; Ticonic Bank *v.* Stackpole, 41 Me. 302; Piner *v.* Clary, 17 B. Mon. 645; Williams *v.* Putnam, 14 N. H. 540, Parker, C. J., saying: "The similarity between the indorsement of notes, and the drawing and indorsement of bills of exchange is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a different character of evidence to prove the same facts with regard to two

But the law merchant does not require protest in the case of dishonor of inland or domestic bills and notes, and independently of statute the protest of such paper means nothing and has no value whatever.[1] But the great convenience of proving the fact of dishonor by a notarial protest has brought about the enactment of statutes in many, if not in most of the States, whereby a notarial protest is allowed in the case of inland bills and notes in like manner. In some of the States it is made an absolute requirement as in the case of foreign bills; and, perhaps everywhere, the protest of inland bills and notes, when provided for by statute, is required in order to recover the damages provided for under the statute. But, generally, the statutes are permissive only, and do not make it incumbent upon the holder of inland bills and notes to protest, in order to save the liability of drawer and indorsers.[2]

Although a bill, payable at a certain time after date, need not be presented for acceptance until maturity,[3] yet if it be presented for acceptance at an earlier day, and acceptance be refused, the bill must be immediately protested, and notice of dishonor given, in order to hold indorsers and drawer.[4] Whenever a bill has been presented for acceptance and dishonored, it must be protested for non-acceptance.[5] But if there has been a protest for non-

instruments, which, though different in some respects as to their phraseology, are so essentially similar in their nature and operation." But see *contra* Kirtland *v.* Wanzer, 2 Duer, 278.

[1] 1 Daniel's Negot. Inst., § 927.

[2] Bailey *v.* Dozier, 6 How. 23; Wanzer *v.* Tupper, 8 How. 234.

[3] As to the requirments of presentment for acceptance, see *ante*, § 211.

[4] Bank of Washington *v.* Triplett, 1 Pet. 25; O'Keefe *v.* Dunn, 6 Taunt. 305; *s. c.* 5 Maule & S. 282; United States *v.* Barker, 4 Wash. C. C. 464.

[5] Gale *v.* Wash, T. R. 239; Watson *v.* Loring, 3 Mass. 557; Winthrop *v.* Pepoon, 1 Bay, 468; Sterry *v.* Robinson, 1 Day, 11; Allen *v.* Merchants' Bank, 22 Wend. 215; Mason *v.* Franklin, 3 Johns. 202; Phillips *v.* McCurdy, 1 Harr. & J. 189; Thompson *v.* Cumming, 2 Leigh, 321;

acceptance, it is not necessary to present for payment and protest for non-payment, although a separate protest for non-payment may be made at maturity of the bill.[1]

If the holder has the paper protested for non-payment, when the law merchant does not even allow protest, — and it is likely also, when it does not require protest, — the notary public cannot recover his fees of the parties to the paper.[2] It may, however, be a legitimate charge against the parties, where protest is permitted, but not required, as in the case of inland bills, and the collecting bank has not been notified that protest was not desired.[3]

§ 322. **By whom protest should be made.** — As a general rule protest should be made by a notary public, and by the same notary who presented the paper for payment or acceptance, and noted the dishonor.[4] But if there be no notary in the place of payment, then the protest may be made out by a reputable citizen, in the presence of two witnesses. The witnesses do not seem to be absolutely required, except in England as to inland bills, but it is customary to have them.[5]

Story on Bills, § 273. But it has been held by the Supreme Court of the United States and of Pennsylvania, that protest for and notice of non-acceptance need not be shown, for the reason that they were not required by the law merchant of this country. Brown *v.* Barry, 3 Dallas, 365; Clark *v.* Russell, 3 Dallas, 295; Read *v.* Adams, 6 Serg. & R. 358.

[1] De la Torre *v.* Barclay, 1 Stark., pt. 2, 7; Campbell *v.* French, 6 T. R. 200; Thompson on Bills (Wilson's ed.), 308.

[2] 1 Parsons' N. & B. 646; Johnson *v.* Bank of Fulton, 29 Ga. 260. This is particularly true, where there is no drawer or indorser to be charged by the notice of dishonor. German *v.* Ritchie, 9 Kan. 110; Noyes *v.* White, 9 Kan. 640; Cramer *v.* Eagle Mfg. Co., 23 Kan. 400.

[3] Merritt *v.* Benton, 10 Wend. 117.

[4] Cribbs *v.* Adams, 13 Gray, 597; Ocean Nat. Bank *v.* Williams, 102 Mass. 141; Commercial Bank *v.* Varnum, 49 N. Y. 269; Commercial Bank *v.* Barksdale, 36 Mo. 563; Sacriber *v.* Brown, 3 McLean, 481.

[5] Burke *v.* McKay, 2 How. 66; Read *v.* Bank of Kentucky, 1 T. B. Mon. 91; Todd *v.* Neal's Admr., 49 Ala. 273.

In making the protest, the notary is to follow the instructions of the holder of the paper; and he is not responsible, if the instructions were wrong, and his following them results in damage to the holder.[1]

§ 323. **Where protest should be made.** — The protest for non-acceptance may be made at the domicile of the drawee or at the place of payment, if the two places are different. But since the presentment for acceptance must be made at the domicile, it is better to protest it at that place.[2] The protest for non-payment should be made always at the place of payment, although it has been held to be permissible to protest for non-payment at the domicile of the drawee, where there has been a refusal to accept the bill.[3]

§ 324. **By whom should presentment be made in preparation for protest.** — While any holder of the paper may present it for payment, and receive payment;[4] if payment or acceptance is refused, and it becomes necessary to protest it for non-payment or non-acceptance, the notary public who is to make the protest is obliged by law to make a second demand, so that he can of his own personal knowledge testify to the fact of dishonor. And although it is more or less customary for the notary's clerk to make the presentment and demand for payment, it is almost universally held by the courts to be insufficient for any one to make the presentment but the notary who notes the dishonor and protests for non-payment.[5] But, of course,

[1] Commercial Bank *v.* Varnum, 14 N. Y. S. C. (7 Hun) 236; *s. c.* 49 N. Y. 269.

[2] Chitty on Bills (13th Am. ed.), [*334] 374; Thompson on Bills, 308.

[3] Mitchell *v.* Baring, 4 C. & P. 35; 19 Eng. C. L. 261; *s. c.* 10 Barn. & C. 4; 21 Eng. Com. Law, 12.

[4] See *ante*, § 311.

[5] Leftly *v.* Mills, 4 T. R. 170; Ocean Nat. Bank *v.* Williams, 102 Mass.

proof of general custom would be admissible to show that in a particular place the practice for a notary's clerk to make the demand was recognized.[1] And it has been held to be admissible, in obedience to a local custom, for the demand to be made by the deputy of the notary.[2] But the custom must be proved, affirmatively, to relate to foreign bills. It would not be sufficient to prove that such a custom prevailed as to the protest of inland bills and notes.[3]

§ 325. **Noting the dishonor and extending protest.** — The law merchant requires that the essential part of the protest should be made on the same day that the presentment and demand was made. And, ordinarily, where the notary is not unduly pressed by business, he would make out his protest on that day. But, for the convenience of notaries, whose time may be so fully occupied that it may

143; Dougan *v.* Wood, 49 Ala. 242; Commercial Bank *v.* Varnum, 49 N. Y. 275; Cribbs *v.* Adams, 13 Gray, 597; Busch *v.* Hill, 24 Tex. 153; Locke *v.* Huling, 24 Tex. 311; Bank of Kentucky *v.* Casey, 3 B. Mon. 629; McClane *v.* Fitch, 4 B. Mon. 600; Wittenberger *v.* Spalding, 33 Mo. 421; Commercial Bank *v.* Barksdale, 36 Mo. 563; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Carter *v.* Brown, 6 Humph. 548; Sacrider *v.* Brown, 3 McLean, 481. In Commercial Bank *v.* Barksdale, Holmes, J., said: "It is well established that the presentment and demand must be made by the same notary who protests the bill; it cannot be done by the clerk, or by any other person as his agent, though he be also a notary. The protest is to be evidence of the facts stated in it, of which the notary is supposed to have actual knowledge, and credit is given to his official statements by the commercial world on the faith of his public or official character. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another." But see Chitty on Bills (13th Am. ed.), 355, note 4.

[1] Commercial Bank *v.* Varnum, 49 N. Y. 275; Commercial Bank *v.* Barksdale, 36 Mo. 563; Wittenberger *v.* Spalding, 33 Mo. 421; Nelson *v.* Fotterall, 7 Leigh, 179; Cribbs *v.* Adams, 13 Gray, 600.

[2] McClane *v.* Fitch, 4 B. Mon. 600; Bank of Kentucky *v.* Gary, 6 B. Mon. 629; Buckley *v.* Seymour, 30 La. Ann. 1384; Cribbs *v.* Adams, 13 Gray, 600; Carter *v.* Union Bank, 7 Humph. 548.

[3] Ocean Nat. Bank *v.* Williams, 102 Mass. 143. See Stewart *v.* Allison, 6 S. & R. 324.

be impossible for them to make out the protest on the same day, the law permits this part of the work to be postponed to some future day, if he makes a minute on the back of the paper, or otherwise, of the fact of presentment and dishonor; giving the date, the facts of presentment, demand and refusal, together with any reasons for the same, if any were given, and the charges of protest. This is called noting the dishonor, and while it was not known to the early law, custom has made it an equivalent of the protest itself, as to the requirement that protest should be made on the same day.[1]

If the dishonor is not noted, or protest written out, on the same day, the drawer and indorsers will be discharged; for the notary is not allowed to trust to his memory for the requisite particulars.[2] If the dishonor has been properly noted on the day of presentment, the extension or completion of the protest may be made at any time before trial.[3] This is the general rule, and although it has been contended that the extension of the protest should be completed before the payment in the case of acceptance *supra protest*, the distinction is not recognized; and in this, as in other cases, the extension may be made at any time before trial, provided the noting of dishonor had been made on the day of dishonor.[4] Where a bill is protested both for non-acceptance and non-payment, it will not be sufficient to note

[1] Chaters *v.* Bell, 4 Esp. 48; Geralopulo *v.* Wieler, 10 C. B. 690; 3 Eng. L. & Eq. 515; Leftly *v.* Mills, 4 T. R. 170.

[2] Dennistoun *v.* Stewart, 17 How. 606; Butler *v.* Play, 1 Mod. 27; Thompson on Bills, 315; Leftly *v.* Mills, 7 T. R. 170; Story on Bills, §§ 278, 283; Chitty on Bills, 377.

[3] Chaters *v.* Bell, 4 Esp. 48; Robins *v.* Gibson, 1 Maule & S. 288; Orr *v.* Maginnis, 7 East, 358, citing Goostrey *v.* Head, Buller N. P. 271; Bailey *v.* Dozier, 6 How. 23; Dennistoun *v.* Stewart, 17 How. 606; Cayuga Co. Bank *v.* Hunt, 2 Hill, 635; Bank of Decatur *v.* Hodges, 9 Ala. 631; Commercial Bank *v.* Barksdale, 36 Mo. 563

[4] Vaudenvall *v.* Tyrrell, 1 Mood. & Malk. 87; Geralopulo *v.* Wieler, 10 C. B. 690; 3 Eng. L. & Eq. 515.

it for non-acceptance, and only extend the protest for non-payment. Both protests should be extended.[1]

§ 326. **The contents of certificate of protest.** — *In the first place*, it is always essential to state the date of the presentment; and it has been held that any error in the certificate, which makes the date of presentment different from the day of maturity, will be fatal to the claim of the holder against the drawer and indorsers,[2] unless the minutes of dishonor contain a correct statement of the date, when a new and correct extension of the protest can be made.

Although it is not necessary, it is advisable for the protest to contain a statement of the hour when presentment was made.

In the second place, if the paper is payable at a particular place, it is required that the notarial certificate should state the place of presentment.[3]

In the third place, there should be distinct and separate statements of presentment for payment and demand of payment. Both presentment and demand must be alleged,[4] although it has been held in Louisiana, that it is sufficient to state that payment was demanded, and not necessary to state further that the paper was presented or exhibited, for that fact may be implied from the allegation of demand.[5]

In the fourth place, it must be stated in plain language, that payment or acceptance had been refused.[6]

[1] Orr *v.* Maginnis, 7 East, 359; Roger *v.* Stephens, 2 T. R. 713.

[2] Walmsley *v.* Acton, 44 Barb. 312.

[3] People's Bank *v.* Brooke, 31 Md. 7.

[4] Musson *v.* Lake, 4 How. 262; Bank of Vergennes *v.* Cameron, 7 Barb. 143; Farmers' Bank *v.* Allen, 18 Md. 475; Union Bank *v.* Fowlkes, 2 Sneed, 555; Nave *v.* Richardson, 36 Mo. 130.

[5] Nott *v.* Beard, 16 La. 308.

[6] Arnold *v.* Kinloch, 50 Barb. 44; Young *v.* Bennett, 7 Bush, 477; Taylor *v.* Bank of Illinois, 7 T. B. Mon. 576; Littledale *v.* Maberry, 43 Me. 264.

In the fifth place, the names of the persons by whom and to whom the presentment and demand had been made. And if when the bill is presented it is impossible to find any one of whom demand can be made, the statement of that fact will suffice.[1]

Sometimes the reasons given by the drawee, acceptor or maker for refusing to honor the paper, are stated in the certificate of protest. But this is not necessary.[2] But it is quite important and usual, although perhaps not absolutely necessary, to prefix to the certificate a copy of the bill or note, with all the indorsements thereon, so that the original, on which the protest was issued, may be easily identified.[3] The notary should also sign the protest. But if the protest be indeed his own act, his name may be written by a clerk or printed, it being only required that the protest be issued by his authority.[4]

Finally, the general law merchant requires the seal of the notary to be attached to the certificate, in order that the certificate may be received as *prima facie* proof of its contents.[5] If the certificate is not sealed, it does not prove itself, and it must be shown by extraneous evidence that the certificate was duly made by the person acting as or for a notary, and that it was sufficient without a seal,

[1] Hildeburn *v.* Turner, 6 How. 69; Otsego Co. Bank *v.* Warren, 18 Barb. 290; Nelson *v.* Fotterall, 7 Leigh, 179; Stainback *v.* Bank of Va., 11 Gratt. 260; Duckert *v.* Van Lilienthal, 11 Wis. 56.

[2] 1 Daniel's Negot. Inst., § 957; Chitty on Bills [*458], 516, 517; Story on Bills, § 276.

[3] Story on Bills, § 276; Chitty on Bills [*458], 517.

[4] Fulton *v.* McCracken, 18 Md. 528.

[5] Nichols *v.* Webb, 8 Wheat. 326; Townsley *v.* Sumrall, 2 Pet. 170; Dickens *v.* Beal, 10 Pet. 582; Carter *v.* Burley, 9 N. H. 558; Bryden *v.* Taylor, 2 Har. & J. 399; Mullen *v.* Morris, 2 Barr, 86; Kirksey *v.* Bates, 7 Port. (Ala.) 529; Donegan *v.* Wood, 49 Ala. 251; Bradley *v.* Northern Bank, 60 Ala. 258; Nelson *v.* Fotterall, 7 Leigh, 180. But see *contra* Bank of Kentucky *v.* Pursley, 3 T. B. Mon. 240; Huffuker *v.* National Bank, 12 Bush, 293; Lambeth *v.* Caldwell, 1 Rob. (La.) 61.

according to the law of the place of presentment.[1] If the law of the place of presentment requires the seal, no other mode of authentication will answer.[2] Any sort of impression on the paper will be a sufficient seal, according to the law merchant, except, possibly, a mere scroll.[3]

Sometimes, the certificate of protest states to whom notice of dishonor is given, but the effect of this statement in the certificate is discussed in the succeeding section.[4]

§ 327. Protest, evidence of what. — The notarial certificate is evidence of the facts therein stated, only so far as they fall within the duty of the notary in making the presentment and demand for payment. If he goes beyond this, and certifies to collateral facts, having no bearing upon the facts of presentment and demand, it is not lawful evidence of those facts, and if those facts are to be proven, other testimony must be introduced.[5]

Although it is quite customary for the notary to give the notices to the drawer and indorsers, he is not obliged to do so, unless he is requested, or unless there is a local custom, which makes it a part of the notary's duty.[6] Since it is not, according to the common-law merchant, a part of the notary's duty to give the notice; if he in fact gives the notices, and certifies in the protest to the fact that notices

[1] Carter *v.* Burley, 9 N. H. 558; Chanoine *v.* Fowler, 3 Wend. 173.

[2] Bank of Rochester *v.* Gray, 2 Hill, 227; Ticknor *v.* Roberts, 11 La. 14.

[3] Bank of Manchester *v.* Slason, 13 Vt. 334; Carter *v.* Burley, 9 N. H. 558; Bradley *v.* Northern Bank, 60 Ala. 258; Conolly *v.* Goodwin, 5 Cal. 220. See Donegan *v.* Wood, 49 Ala. 251

[4] § 327.

[5] Townsley *v.* Sumrall, 2 Pet. 170; Chase *v.* Taylor, 4 Har. & J. 54. For example, the statement that the drawee had no effects or funds of the drawer. Dakin *v.* Graves, 48 N. H. 45; Dumont *v.* Pope, 7 Blackf. 367; 1 Parsons' N. & B. 639. See, also, Maccoun *v.* Atchafalaya Bank, 13 La. 342.

[6] Dickens *v.* Beal, 10 Pet. 582; Morgan *v.* Van Ingen, 2 Johns. 204; Miller *v.* Hackley, 5 Johns. 384; Bank of Rochester *v.* Gray, 2 Hill, 231.

were issued, the certificate is not legal evidence of that fact, and the fact must be established by other evidence.[1] But the statutes of the different States usually provide now, that the notarial certificate of protest will be taken as evidence of any facts stated therein in respect to notice. The protest is also evidence only of the facts stated; and if some material fact is omitted, it will not, as a general rule, be supplied by inference or implication. But there are some cases, in which material facts will be presumed from the facts stated. Thus, it has been held[2] and likewise denied[3] that if a certificate states that notice was addressed to the drawer or indorser at a particular place, without stating that the place is his post-office or residence, the law will presume that it is. But it may be added, that such a question can only arise where the notice is sent to some other place than where the bill bears date, for the law does presume the place of date to be the domicile of the drawer.[4] It is not sufficient evidence of a proper demand or notice, for the certificate to state that demand was made or notice left at the residence, or place of business of a particular person, unless it proceeds to state to whom the demand or notice was addressed. If the latter statement is left out, the evidence is not sufficient to prove due diligence on the part

[1] Miller *v.* Hackley, 5 Johns. 384; Bank of Vergennes, 7 Barb. 144; Walker *v.* Turner, 2 Gratt. 536; Dickens *v.* Beal, 10 Pet. 582; Williams *v.* Putnam, 14 N. H. 540· Couch *v.* Sherrill, 17 Kan. 624; Swayze *v.* Britten, 17 Kan. 625; Lloyd *v.* McGair, 3 Barr. 482; Rives *v.* Parmley, 18 Ala. 256. But see *contra* 2 Parsons' N. & B. 498; Bank of Rochester *v.* Gray, 2 Hill, 231.

[2] Bank of United States *v.* Smith, 11 Wheat. 171; Linkons *v.* Hale, 27 Gratt. 668; Walmsley *v.* Rivers, 34 Iowa, 466.

[3] Bradshaw *v.* Hedge, 10 Iowa, 402; Turner *v.* Rogers, 8 Ind. 140; Stiles *v.* Inman, 55 Miss. 472; Sullivan *v.* Deadman, 19 Ark. 486; Walker *v.* Tunstall, 3 How. (Miss.) 259; Ellis *v.* Commercial Bank, 7 How. (Miss.) 294; Sprague *v.* Tyson, 44 Ala. 340.

[4] See *ante*, § 314.

of the notary to find the interested parties.[1] If the certificate states that demand was made on the acceptor's bookkeeper, clerk, or agent at the acceptor's place of business, it will be taken as presumptive evidence of the person being the acceptor's or drawee's agent or clerk.[2] But it is different, where the demand was not made at the drawee's place of business or residence. In such a case, the agency of the person, on whom demand was made, must be established by other evidence.[3]

It has been held,[4] and likewise denied[5] that it will be sufficient if the certificate states that "due notice was given," or that the party "was duly notified." The objection to such a statement is that it is itself an allegation of the sufficiency of the notice, which is a question of law to be determined by the court and jury, and not by the notary. For the same reason, it has been held insufficient for the certificate of protest to state that the notary "made diligent search and inquiry" for the maker or acceptor.[6]

But if the protest has been made at the proper time and

[1] Rives *v.* Parmley, 18 Ala. 262; Whaley *v.* Houston, 12 La. Ann. 585; Nelson *v.* Fotterall, 7 Leigh, 179; Stainback *v.* Bank of Virginia, 11 Gratt. 260; Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514.

[2] Phillips *v.* Poindexter, 18 Ala. 579; Bradley *v.* Northern Bank, 60 Ala. 259; Dickerson *v.* Turner, 12 Ind. 223. And it would be presumed, if not stated, that the drawee or acceptor was absent. Gardner *v.* Bank of Tennessee, 1 Swan, 420.

[3] Drumm *v.* Bradfute, 18 La. Ann. 681; Coleman *v.* Smith, 26 Pa. St. 255.

[4] Ticonic Bank *v.* Stackpole, 41 Me. 321; Lewistown Bank *v.* Leonard, 43 Me. 144; Orono Bank *v.* Wood, 49 Me. 26; Pattee *v.* McCrillis, 53 Me. 410; Bushworth *v.* Moore, 36 N. H. 144; Simpson *v.* White, 40 N. H. 540; Union Bank *v.* Middlebrook, 33 Conn. 95; Tate *v.* Sullivan, 30 Md. 464; Galladay *v.* Bank of Union, 2 Head, 57; Kern *v.* Van Phal, 7 Minn. 426; McFarland *v.* Pico, 8 Cal. 626.

[5] Ducket *v.* Van Lilienthal, 11 Wis. 56; Kimball *v.* Bowen, 2 Wis. 224; Smith *v.* Hill, 6 Wis. 154; Couch *v.* Sherrill, 17 Kan. 622.

[6] Cockrill *v.* Loewenstein, 9 Heisk. 206; Bennett *v.* Young, 18 Pa. St. 261.

place and in the proper manner, but all the statements necessary to prove demand and notice do not appear on the face of the notarial certificate, parol evidence is admissible to supply the deficiency.[1]

The protest is evidence of the facts stated therein, only in the case of foreign bills and notes, unless a statute has applied the rule of protest to inland bills and notes.[2] Where a State statute provides for the protest of an inland bill, it is evidence of dishonor only in the State in which the bill was executed.[3] So, also, is the protest of a foreign bill no evidence of dishonor in the country in which the protest was made.[4]

Finally, the protest is *prima facie* evidence only, and the facts stated therein may be disproved by any competent testimony to the contrary.[5]

[1] Magoun *v.* Walker, 49 Me. 420; Seneca Co. Bank *v.* Neass, 5 Denio, 329; Hunter *v.* VanBomhorst, 1 Md. 504; Nailor *v.* Bowie, 3 Md. 252; Graham *v.* Langster, 1 Md. 59; Sasseer *v.* Farmers' Bank, 4 Mo. 429; Wetherall *v.* Claggett, 28 Md. 565; Reynolds *v.* Appleman, 41 Md. 615; Stainback *v.* Bank of Va., 11 Gratt. 269.

[2] Young *v.* Bryan, 6 Wheat. 146; Union Bank *v.* Hyde, 6 Wheat. 572; Bond *v.* Bragg, 17 Ill. 69; Sullivan *v.* Deadman, 19 Ark. 484; Sumner *v.* Bowen, 2 Wis. 524.

[3] Dutchess Co. Bank *v.* Ibbottson, 5 Dev. 110.

[4] Chessmer *v.* Noyes, 4 Camp. 129; Nicholls *v.* Webb, 8 Wheat. 326. See *contra* Story on Bills, § 277, n. 2.

[5] Dickens *v.* Beal, 10 Pet. 582; Spence *v.* Crockett, 5 Baxt. 576; Ricketts *v.* Pendleton, 14 Md. 330; Howard Bank *v.* Carson, 50 Md. 27; Nelson *v.* Fotterall, 7 Leigh, 180; Union Bank *v.* Fowlkes, 2 Sneed, 555.

CHAPTER XVII.

NOTICE OF DISHONOR.

SECTION 334. Nature and necessity of notice.
335. Who may give the notice.
336. To whom notice should be given.
337. The time allowed for giving notice.
338. Mode of giving notice, when important.
339. Mode of giving notice when parties reside in same place.
340. How and where personal notice must be served.
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342. To what post-office notice should be addressed.
343. What is meant by "residing at same place."
344. What constitutes notice — May be verbal or written.
345. A sufficient description of the bill or note.
346. Statement of dishonor and protest.
347. Statement that holder looks for payment to party notified.
348. Allegation and proof of notice.

§ 334. **Nature and necessity of notice.** — Whenever a commercial instrument is dishonored by a refusal to accept or pay, it becomes the duty of the holder to give immediate notice to all parties to the instrument, secondarily liable, whom he wishes to hold liable. The requirement to give notice to drawers and indorsers is considered as entering as a condition into the contract of these parties, and their liability is made to depend upon the performance of the condition.[1] The breach of the condition, *i.e.*, the failure to give notice of dishonor, constitutes so complete a discharge of the liability of the drawer or indorser, that

[1] Musson *v.* Lake, 4 How. 262; Rothschild *v.* Currie, 41 E. C. L. R. 43.

they cannot be held liable on the original transaction which constitutes the consideration for their liability on the commercial paper.[1]

Notice is not required to be given to parties primarily liable, such as sureties and accommodation makers.[2] Nor is notice required where the paper is non-negotiable.[3]

§ 335. **Who may give the notice.** — It is well settled that a total stranger to the paper and to the parties to the paper, cannot give the notice.[4] The notice must be given by some party to the paper, or by his duly authorized agent. And where the notice is given by an agent, it may be given in the name either of the agent or of the principal.[5] In his capacity, as the agent of the holder, the notary may give the notice;[6] and so, also, any bank or

[1] Bridges *v.* Berry, 3 Taunt. 130; 3 M. & S. 362; Darrach *v.* Savage, 1 Show. 155; Rogers *v.* Stephens, 2 T. R. 713; Gale *v.* Walsh, 5 T. R. 239; Peacock *v.* Purcell, 14 C. B. (N. S.) 728; Smith *v.* Miller, 43 N. Y. 171; 52 N. Y. 546; Betterton *v.* Roope, 3 Lea, 220; Shipman *v.* Cook, 1 Green (N. J.), 251; Rucker *v.* Hiller, 16 East, 43; 3 Campb. 217; Allan *v.* Eldred, 50 Wis 136. And this is true, even though the parties to the commercial paper expressly agree that the taking of the paper shall exonerate the parties to the original debt, until the paper has been paid. Their liability on the original debt is necessarily conditional upon the saving of their liability as parties to the paper. Reid *v.* Coats, Bro. P. C.; Chitty on Bills [*434], 488.

[2] Hays *v.* N. W. Bank, 9 Gratt. 127.

[3] Pitman *v.* Breckenridge, 3 Gratt. 129.

[4] Stanton *v.* Blossom, 14 Mass. 116; Stewart *v.* Kennett, 2 Camp. 177; Chanoine *v.* Fowler, 3 Wend. 173; Juniata Bank *v.* Hale, 16 Serg. & R. 157; Brailsford *v.* Williams, 15 Md. 150; Story on Notes, § 301; Thompson on Bills, 355.

[5] Harrison *v.* Ruscoe, 15 M. & W. 231; Woodthrop *v.* Lawes, 2 M. & W. 109; Logerson *v.* Hare, 1 Jur. 71.

[6] Shed *v.* Brett, 1 Pick. 401; Bank of Utica *v.* Smith, 18 Johns. 230; Smedes *v.* Utica Bank, 20 Johns. 372; *s. c.* 3 Cow. 662; Safford *v.* Wyckoff, 1 Hill, 11; Cowperthwaite *v.* Sheffield, 1 Sandf. 416; Fulton *v.* McCracken, 18 Md. 528; Crawford *v.* Branch Bank, 7 Ala. 205; Renick *v.* Robbins, 28 Mo. 339; Swayze *v.* Britton, 17 Kan. 629.

banker, in whose hands the paper is placed for collection.[1]

Of course, any lawful holder of the paper, whether he holds it in trust for another, or for his own benefit, may give the notice.[2] But it is not necessary for him to give it. If the notice is given to a prior indorser, by one whose liability has been already fixed, it will enure to the benefit of the holder. For example, if the holder or his agent, gives notice to the immediate indorser alone, and he (the notified indorser) then sends notices to the other prior indorsers, these prior indorsers will not only be bound to the indorsee, who gives the notice, but also to the holder.[3] But in order that an indorser's notice may bind another indorser, the liability of the indorser, giving the notice, must be fixed by having himself received the required notice of dishonor. If he has not received this notice, he is discharged from liability, and may properly be treated as a stranger to the paper.[4] But it is not necessary for the intermediate indorser to know when he sends out his notices, that a notice had been sent to him. His ignorance of his being notified will not invalidate his own notices to prior indorsers.[5]

[1] Freeman's Bank *v.* Perkins, 7 Shep. 292; Ogden *v.* Dobbin, 2 Hall, 112; Bank of State of Mo. *v.* Vaughan, 36 Mo, 90.

[2] Story on Bills, § 303; Cowperthwaite *v.* Sheffield, 1 Sandf. 416.

[3] Hilton *v.* Shepherd, 6 East, 14; Chapman *v.* Keene, 3 Ad. & El. 193; 4 Nev. & M. 607; Jameson *v.* Swinton, 2 Camp. 373; Lysaught *v.* Bryant, 9 C. B. 46; *s. c.* 2 Carr. & K. 1016; Wilson *v.* Swabey, 1 Stark. 34; Marr *v.* Johnson, 9 Yerg. 1; Swayze *v.* Britton, 17 Kan. 627; Triplett *v.* Hunt, 3 Dana, 126; Whitman *v.* Farmers' Bank, 8 Port. (Ala.) 258; Stanton *v.* Blossom, 14 Mass. 116; Bachellor *v.* Priest, 12 Pick. 406; Stafford *v.* Yates, 18 Johns. 327; Bank of United States *v.* Goddard, 5 Mason, 366; Wilson *v.* Mitchell, 4 How. (Miss.) 272; Abat *v.* Rion, 9 Mart. (La.) 465; Renshaw *v.* Triplett, 23 Mo. 213.

[4] Turner *v.* Leach, 4 B. & Ald. 451; Harrison *v.* Ruscoe, 15 L. J. Exch. 110; 15 M. & W. 231; Rowe *v.* Tipper, 13 C. B. 249.

[5] Jennings *v.* Roberts, 24 L. J. Q. B. 102; Thompson on Bills, 358.

On the other hand, if the holder has notified all the indorsers, the notices will enure to the benefit of any one of the indorsers, who is compelled to pay the bill or note, and he may hold any prior indorser liable, provided the notice, sent to him by the holder, actually reaches him.[1] But if this notice did not reach the first or other intermediate indorser, it has been held,[2] although contrary to high authority,[3] that the intermediate indorser must have sent out a notice himself, in order to hold the prior indorser liable.

It has also been held that the acceptor of a bill and the maker of a note may give the notice.[4] But this has been denied to be a sufficient notice, unless the holder had constituted the acceptor or maker his agent for the purpose of giving the notice.[5] One who holds the paper as collateral security for a debt, may and should give notice;[6] and so, also, may one who accepts or pays *supra protest*.[7]

If the holder be dead, his personal representative should give the notice, if there be one; if no representative has yet been appointed, the notice must be given by the representative within a reasonable time after his appointment.[8]

§ 336. **To whom notice should be given.** — The notice must in general be given to every person secondarily liable,

[1] Stafford *v.* Yates, 18 Johns. 327.

[2] Beale *v.* Parrish, 20 N. Y. 407, overruling 24 Barb. 243.

[3] 1 Parsons' N. & B. 627; Thompson on Bills, 327.

[4] Shaw *v.* Craft, Chitty on Bills, 333; Rosher *v.* Kiennan, 4 Camp. 87; Glascow *v.* Pratte, 8 Mo. 336; First Nat. Bank *v.* Ryerson, 23 Iowa, 508; Brailsford *v.* Williams, 15 Md. 157; Chapman *v.* Keene, 3 Ad. & El. 193 (30 E. C. L. R. 69), overruling Tindall *v.* Brown, 1 T. R. 167.

[5] 1 Parsons' N. & B. 505; Parke, B., in Harrison *v.* Ruscoe, 15 M. & W. 531; Ex parte Barclay, 7 Ves. 597; Tindall *v.* Brown, 1 T. R. 167; Stewart *v.* Kennett, 2 Camp. 177.

[6] Peacock *v.* Parcell, 14 C. B. (N. S.) (108 E. C. L. R.) 728.

[7] Konig *v.* Bayard, 1 Pet. 262; Martin *v.* Ingersoll, 8 Pick. 1.

[8] White *v.* Stoddard, 11 Gray, 38; 1 Parsons' N. & B. 444, 559

such as drawers and indorsers,[1] whom the holder wishes to hold liable. And where he has not notified all of them, those who are notified must for their own protection give notice to the other prior indorsers.[2] Notice must be given to indorsers, even though they have indorsed simply for the purpose of collection of the paper; as, for example, where the holder puts his commercial paper in a bank for collection at a distance, and the bank of deposit sends the paper to its banking correspondent at the place of residence of the acceptor or maker, or at the place of payment, if one be specified. Notice must be sent to the bank of deposit as well as to the other indorsers.[3] It is even necessary to give notice of dishonor to the indorser of overdue paper; for although the indorsement after maturity does not give the indorser the rights of *bona fide* holders, in respect to the exclusion of equitable defenses, overdue paper is still negotiable, and in order that the indorser may be held liable, there must be a demand and notice of dishonor.[4]

[1] See *post*, chap. XVIII, for the circumstances under which notice to special indorsers is excused.

[2] Brown *v.* Ferguson, 4 Leigh, 37; Cardwell *v.* Allen, 33 Gratt. 167; Stix *v.* Matthews, 63 Mo. 371; see *ante*, § 335.

[3] Clode *v.* Bailey, 12 L. J. Exch. 17; 12 M. & W. 51; Scott *v.* Lifford, 9 East, 347; McNeal *v.* Wyatt, 3 Humph. 125; Butler *v.* Duval, 4 Yerg. 265.

[4] See *ante*, § 269; Colt *v.* Barnard, 12 Pick. 260; Light *v.* Kingsbury, 50 Mo. 331; Hart *v.* Eastman, 7 Minn, 74; Jones *v.* Middleton, 29 Iowa, 188; McEwer *v.* Kirtland, 33 Iowa, 348; Blake *v.* McMillen, 33 Iowa, 150; Pryor *v.* Bowman, 38 Iowa, 92; Bank of Red Oak *v.* Oasis, 40 Iowa, 332; Graul *v.* Strutzel, 53 Iowa, 712; Bishop *v.* Dexter, 2 Conn. 419; Lockwood *v.* Crawford, 18 Conn. 361; Dwight *v.* Emerson, 2 N. H. 159; Leavitt *v.* Putnam, 3 Coms. 494; Berry *v.* Robinson, 9 Johns. 121; Greeley *v.* Hunt, 21 Me. 455; McKinney *v.* Crawford, 8 Serg. & R. 351; Sawyer *v.* Brownell, 13 R. I. 141; Atwood *v.* Hazelton, 3 Bailey, 457; Course *v.* Shackleford, 2 Nott & McC. 283; Fell *v.* Dial, 14 S. C. 247; Bemis *v.* McKenzie, 13 Fla. 557; Branch Bank *v.* McGaffrey, 9 Ala. 153; Adams *v.* Torbert, 6 Ala. 865; Swartz *v.* Redfield, 13 Kan. 550; Shelby *v.* Judd, 24 Kan. 161; Duffy *v.* O'Connor, 7 Baxt. 498; Beebe *v* Brooks, 12 Cal. 308; Thompson *v.* Williams, 14 Cal. 162. But see Gray *v.* Bell, 3 Rich. 71.

But if there has been default of payment, in consequence of which one of the indorsers paid and took up the paper, and subsequently negotiated it, the purchaser would get the transferring indorser's claims against the prior indorsers and the drawer, if they have been notified of the dishonor, according to the law; and the parties, including the transferring indorser, would be bound to this purchaser without any other demand or notice.[1]

If there are two or more joint indorsers, notice must be sent to each of them,[2] unless they are partners, when notice to one will be sufficient to bind the others.[3] But if one of the partners lives at the place of protest, and the others reside elsewhere, or are temporarily absent, the notice must be given to the resident partner.[4] And if one of the partners dies before maturity of the paper, notice should be sent to the survivor.[5]

Notice may also be given to the agent of the drawer or indorser, if he be authorized expressly or by custom of busi-

[1] St. John *v.* Roberts, 31 N. Y. 441; Scott *v.* First Nat. Bank, 71 Ind. 467; Libby *v.* Pierce, 47 N. H. 314; Montgomery R. R. Co. *v.* Trebles, 44 Ala. 258; Williams *v.* Matthews, 3 Cow. 252.

[2] Union Bank *v.* Willis, 8 Met. 512; Shepard *v.* Hawley, 1 Conn. 368; Hubbard *v.* Matthews, 54 N. Y. 50; Willis *v.* Green, 5 Hill, 232; Bank of Chenango *v.* Root, 4 Cow. 126; Bealls *v.* Peck, 12 Barb. 245; Bank of United States *v.* Beirne, 1 Gratt. 234; People's Bank *v.* Keech, 26 Md. 521; Dabney *v.* Stidger, 4 Smed. & M. 749; Boyd *v.* Orton, 16 Wis. 495; State Bank *v.* Slaughter, 7 Blackf. 133; Miser *v.* Trooinger, 7 Ohio St. 238; Sayre *v.* Frick, 7 W. & S. 383; Wood *v.* Wood, 1 Har. 429. But see Dodge *v.* Bank of Kentucky, 2 A. K. Marsh. 510; Higgins *v.* Morrison, 4 Dana, 100.

[3] Gowan *v.* Jackson, 20 Johns. 176; People's Bank *v.* Keech, 26 Md. 521; Rhett *v.* Pole, 2 How. 457. This is true, even after the dissolution of the firm. Hubbard *v.* Matthews, 54 N. Y. 50; Fourth Nat. Bank *v.* Henschen, 52 Mo. 207; Slocum *v.* Lizardi, 21 La. Ann. 355; Brown *v.* Turner, 15 Ala. (N. S.) 832; Coster *v.* Thomason, 19 Ala. (N. S.) 717.

[4] Hubbard *v.* Matthews, 54 N. Y. 50; Hume *v.* Watt, 5 Kan. 34.

[5] Hubbard *v.* Matthews, 54 N. Y. 50; Slocumb *v.* Lizardi, 21 La. Ann. 355.

ness to receive such notices.[1] An agent, having a general authority to transact business in the name of his principal, may receive notice of dishonor for him.[2] An attorney at law or solicitor cannot, unless expressly authorized.[3] And even the agent, who had written the indorsement for the principal, and in his name, may not be authorized to receive notice of dishonor. In any such case, the notice should be addressed to the principal.[4] But if an agent draws or indorses a commercial instrument in his own name, the notice should at all events be sent to the agent.[5]

If the drawer or indorser be bankrupt, notice should be given to the assignee, if there be one, particularly if the party has absconded;[6] although it might be sufficient to give the notice to the party, notwithstanding the appointment of an assignee.[7] But if there be no assignee, notice must be given to the party himself, or in his absence to any one representing him or his estate.[8]

If the party be dead, and the holder is ignorant of his death, a notice addressed to the deceased is sufficient.[9] But if his death is known to the holder, and a personal representative has been appointed or has qualified, then the notice should be addressed to his personal representative by

[1] Louisiana St. Bank *v.* Ellery, 16 Mart. (La.) 87; Cross *v.* Smith, 1 N. & Sel. 545.

[2] Wilkins *v.* Commercial Bank, 6 How. (Miss.) 217; Cross *v.* Smith, 1 M. & Sel. 545; Fassin *v.* Hubbard, 55 N. Y. 471.

[3] Louisiana State Bank *v.* Ellery, 16 Mart. (La.) 87; Cross *v.* Smith, 1 M. & Sel. 540.

[4] Clay *v.* Oakley, 17 Mart. (La.) 137; Valk *v.* Gaillard, 4 Strob. 99; New York, etc., Co. *v.* Selma Sav. Bank, 51 Ala. 305; Wilcox *v.* Routh, 9 Smed. & M. 476.

[5] Grosvenor *v.* Stone, 8 Pick. 79.

[6] Rhode *v.* Proctor, 4 B. & C. 517; 6 Dow. & R. 610.

[7] 1 Parsons' N. & B. 500.

[8] Ex parte Moline, 19 Ves. 216; Rhode *v.* Proctor, 4 B. & C. 517; 6 Dow. & R. 610.

[9] Barnes *v.* Reynolds, 4 How. (Miss.) 114; Mespero *v.* Pedesclaux, 22 La. Ann. 227.

name, if he and his address can be ascertained by reasonable inquiry. No other notice will suffice.[1] If there be no personal representative, then the notice may be sent to the family residence of the deceased,[2] or addressed "to the legal representative" of the deceased.[3] A notice, left at the deceased's residence with his son-in-law, has been held to be sufficient, if there were no representative.[4] But a notice, addressed to one, who was expected to be appointed administrator, before his appointment, would be insufficient; since before his appointment he was under no obligation to do anything for the protection of the estate.[5] If a notice has been sent to a proper person before the appointment of a personal representative, it will not be necessary to send a second notice.[6] But if there has been any defect in the previous sending of the notice, its actual reception by the personal representative within a reasonable time will cure such defects.[7]

§ 337. **The time allowed for giving notice.**— It is necessary that the notice be given after the paper has been

[1] Goodnow *v.* Warren, 122 Mass. 79; Oriental Bank *v.* Blake, 22 Pick. 206; Cayuga Co. Bank *v.* Bennett, 5 Hill, 236; Smalley *v.* Wright, 40 N. J. 471; Barnes *v.* Reynold, 4 How. (Miss.) 114; 1 Parsons' N. & B. 501, 502. If there be more than one personal representative, notice to one will be sufficient. Bealls *v.* Peck, 12 Barb. 245; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347; Lewis *v.* Bakewell, 6 La. Ann. 359.

[2] Stewart *v.* Eden, 2 Caines, 121; Merchants' Bank *v.* Birch, 17 Johns. 25; Goodnow *v.* Warren, 122 Mass. 82; Linderman *v.* Guldin, 34 Pa. St. 54.

[3] Boyd's Admr. *v.* City Sav. Bank, 15 Gratt. 501; Planters' Bank *v.* White, 2 Humph. 112; Pillow *v.* Hardeman, 3 Humph. 538. But it would not be sufficient, if the notice were addressed to "the estate" of the deceased, for that term is equally applicable to the heirs-at-law, Massachusetts Bank *v.* Oliver, 10 Cush. 557; Cayuga Bank *v.* Bennett, 5 Hill, 236.

[4] Weaver *v.* Penn, 27 La. Ann. 129.

[5] Mathewson *v.* Strafford Bank, 45 N. H. 104.

[6] Merchants' Bank *v.* Birch, 17 Johns. 25.

[7] Cayuga Co. Bank *v.* Bennett, 5 Hill, 236; Maspero *v.* Pedesclaux, 22 La. Ann. 227; 1 Parsons' N. & B. 502.

dishonored. Notice, issued in anticipation of dishonor, is insufficient.[1]

The older authorities state that the notice must be given "within a reasonable time" after the dishonor.[2] But the present rule of the law merchant is that the holder has until the expiration of the next day after dishonor, in which to give notice, subject to certain modifications, necessary in the cases where the notices have to be sent away from the place of protest. Where the party entitled to notice resides in the place of protest, the notice may be sent to him at his residence at any time during the day following the dishonor of the paper before the hours of rest. But if he is to leave the notice at the party's place of business, it must be left during business hours.[3] Where the notice is to be sent to one resident elsewhere, the holder has until the last mail of the day after dishonor is made up; provided the mail on that day does not leave at an unreasonable hour. If it leaves at an unreasonable hour, the holder has until the next mail to send out his notices.[4]

[1] Jackson *v.* Richards, 2 Cairnes, 343; Chitty on Bills, [*482] 544.

[2] Story on Bills, § 285; Chitty on Bills, 366; 1 Parsons' N. & B. 507.

[3] Allen *v.* Edmundson, 2 C. & K. 547; Adams *v.* Wright, 14 Wis. 408; Jameson *v.* Swinton, 2 Taunt. 224; Crosse *v.* Smith, 1 Maule & S. 545; Garnett *v.* Woodcock, 6 Maule, & S. 44; Parker *v.* Gordon, 7 East, 385; Cayuga Co. Bank *v.* Hunt, 2 Hill, 635.

[4] Lenox *v.* Roberts, 2 Wheat. 373; United States *v.* Barker, 12 Wheat. 559; 4 Wash. 465; Fullerton *v.* Bank of U. S., 1 Pet. 605; Bank of Alexandria *v.* Swan, 9 Pet. 33; Haskell *v.* Boardman, 8 Allen, 40; Haynes *v.* Birks, 3 Bos. & P. 599; Chick *v.* Pillsbury, 24 Me. 458; Hartford Bank *v.* Stedman, 3 Conn. 489; Mitchell *v.* Cross, 2 R. I. 437; Carter *v.* Burley, 9 N. H. 558; Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Eagle Bank *v.* Chapin, 3 Pick. 180; Lawson *v.* Farmers' Bank, 1 Ohio St. 206; Downs *v.* Planters' Bank, 1 Smed. & M. 261; Wemple *v.* Dangerfield, 2 Smed. & M. 445; Burgess *v.* Vreeland, 4 N. J. 71; Sussex Bank *v.* Baldwin, 2 Har. 487; Howard *v.* Ives, 1 Hill, 263; Manchester Bank *v.* Fellows, 8 Fost. 302; 1 Parsons' N. & B. 511; Chitty on Bills, [*486] 548; Darbishire *v.* Parker, 6 East, 3. But see Story on Bills (Bennett's ed.), § 290, note 1, where it is urged that the holder should be allowed the whole of the next day after dishonor in which to give his notices.

What shall be considered a reasonable hour for the departure of the mail, within the meaning of this rule, cannot be stated with any degree of accuracy; for it depends in each case upon the habits of the community in which the protest was issued. Any hour before seven a. m. would be considered unreasonable.[1] Seven a. m. is doubtful,[2] while all other hours after eight, certainly after nine a. m., are considered reasonable; and if there be no later mail, the notice should be sent out by the mail leaving at such an hour, in order to hold drawer and indorsers.[3] It must be remembered, however, if there is more than one mail on the day after dishonor, the last mail will be early enough.[4] In the case of transmission of notices over the seas, the notice must be sent by the next regular mail ship.[5]

Each indorser has the same length of time after receiving notice of dishonor, in which to notify the parties whom he wants to hold liable, as the holder of the paper has;[6] and ex-

[1] Gaill *v.* Jeremy, 1 M. & M. 61; Mitchell *v.* Cross, 2 R. I. 437; Wemple *v.* Dangerfield, 2 Smed. & M. 445; West *v.* Brown, 6 Ohio St. 542; Davis *v.* Hanly, 7 Eng. (Ark.) 645; Commercial Bank *v.* King, 3 Rob. (La.) 243; Chick *v.* Pillsbury, 24 Me. 458; Deminds *v.* Kirkman, 1 Smed. & M. 644.

[2] Held reasonable in Stephenson *v.* Dickson, 24 Pa. St. 148; unreasonable in Chicks *v.* Pillsbury, 24 Me. 458.

[3] United States *v.* Barker, 4 Wash. C. C. 464; *s. c.* 12 Wheat. 559; Haskell *v.* Boardman, 8 Allen, 38; Lawson *v.* Farmers' Bank, 1 Ohio St. 206; Downes *v.* Planters' Bank, 1 Smed. & M. 261. But see Burgess *v.* Vreeland, 4 N. J. 71; Smith *v.* Paillorn, 22 Hun, 832; Hawkes *v.* Salter, 4 Bing. (13 E. C. L. R.) 715, in which nine a. m., and half past nine a. m. were considered too early.

[4] Martin *v.* Ingersoll, 8 Pick. 1; Stephenson *v.* Dickson, 24 Pa. St. 148; Lindo *v.* Unsworth, 2 Camp. 602.

[5] Lenox *v.* Leverett, 10 Mass. 1; Stainback *v.* Bank of Va., 11 Gratt. 260; Muilman *v.* D'Equino, 2 H. Bl. 565; Darbishire *v.* Parker, 6 East, 3.

[6] Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177; 107 Mass. 444; Jameson *v.* Swinton, 2 Taunt. 224; Lowe *v.* Tipper, 13 C. B. 249; Simpson *v.* Turney, 5 Humph. 419; Seaton *v.* Scoville, 18 Kan. 435; Geill *v.* Jeremy, 1 M.& M. 61; Lawson *v.* Farmers' Bank, 1 Ohio St. 206;

cessive diligence on the part of one party will not make up for the delay or negligence of another party. Each party must send out his notices within the required time after receiving notice, in order to hold the indorsers prior to him; and these prior indorsers will be discharged by any delay or negligence of the intermediate indorser in sending out his notices, although the notices reach the prior indorsers within the usual time after dishonor, on account of the unusual promptness of the holder in sending out his notices.[1]

If the next day is a legal holiday, the holder or indorser has until the next business day to send out his notices.[2] But while he is not obliged to give notice of dishonor on a legal holiday, he may do so, and the notice will not be invalid, except possibly on Sunday.[3]

It is to be observed, however, that the holder or indorser need not wait until the expiration of the time, allowed them by law, to give the notice. And the holder may issue the notice of dishonor before the expiration of the day of dishonor if there has been early in the day a proper representment and demand for payment of acceptance.[4]

Bray *v.* Hadwen, 5 Maule & S. 68; 1 Parsons' N. & B. 513; Story on Bills, § 291; Thomson on Bills, 348.

[1] Brown *v.* Ferguson, 4 Leigh, 37; Turner *v.* Leach, 4 B. & Ald. 451; Kennedy *v.* Goddes, 8 Port (Ala.) 263; Mitchell *v.* Cross, 2 R. I. 439; Am. Life Ins. Co. *v.* Emerson, 4 Smed. & M. 177; Etting *v.* Schuylkill Bank, 2 Barr. 355; Smith *v.* Roach, 7 B. Mon. 17; Stix *v.* Mathews, 63 Mo. 371; Fitchburg Bank *v.* Perley, 2 Allen, 433; Carter *v.* Burley, 9 N. H. 558; Manchester Bank *v.* Fellows, 28 N. H. 302; Simpson *v.* Turney, 5 Humph. 419.

[2] Cuyler *v.* Stevens, 4 Wend. 566; Lindo *v.* Unsworth, 2 Camp. 602; Howard *v.* Ives, 1 Hill, 283; Friend *v.* Williamson, 9 Gratt. 31; Martin *v.* Ingersoll, 8 Pick 1. And if notice is received by an indorsee on Sunday, since he is not obliged to open his mail until Monday, he has until Tuesday to send out his notices. Wright *v.* Shawcross, 2 B. & Ald. 501; Bray *v.* Hadwen, 5 Maule & Sel. 68; Haynes *v.* Bicks, 3 Bos. & P. 599; Chitty on Bills (13 Am. ed.), [*488] 551; 1 Parsons' N. &. B. 515.

[3] Deblieux *v.* Bullard, 1 Rob. 66.

[4] Bank of Alexandria *v.* Swan, 9 Pet. 33; Lenox *v.* Roberts, 2 Wheat.

§ 338. **Mode of giving notice, when important.** — If the party to whom the notice is sent actually receives the notice, it is of no consequence how it was transmitted. The actual receipt of the notice in due season cures all defects. The mode of giving the notice is only of value, when the party for whom it was intended does not receive the notice.[1]

§ 339. **Mode of giving notice when parties reside in same place.** — Where the parties reside in the same place, the law merchant now generally requires — it was formerly a universal requirement, — that the notice should be served personally. Notice sent by mail is, according to this rule, insufficient, unless it be actually received.[2] The rule is also the same, where the parties secondarily liable reside at the place of payment and protest, and the holder resides else-

373; Bussard *v.* Levering, 6 Wheat. 102; Lindenberger *v.* Beall, 6 Wheat. 104; Corp *v.* McComb, 1 Johns. Cas. 328; Curry *v.* Bank of Mobile, 8 Port. (Ala.); 360 Coleman *v.* Carpenter, 9 Pa. St. 178; Smith *v.* Little, 10 N. H. 526; McClane *v.* Fitch, 4 B. Mon. 599; Haslett *v.* Ehrick, 1 Nott & McC. 116; Price *v.* Young, 1 McCord, 339; Lawson *v.* Farmers' Bank, 1 Ohio St. 206; King *v.* Crowell, 61 Me. 244; Hartley *v.* Case, 1 C. & P. 556; Leftly *v.* Mills, 4 T. R. 170; Colkett *v.* Freeman, 2 T. R. 59; Haynes *v.* Birks, 3 Bos. & P. 602; Clowes *v.* Chaldecott, 7 L. J. K. B. 147; Ex parte Moline, 19 Ves. 216; Hine *v.* Allely, 4 B. & Ad. 624; 1 Nev. & M. 433; Burbridge *v.* Manners, 2 Camp. 195; Chitty on Bills, [*482] 544.

[1] Bank of United States *v.* Corcoran, 2 Pet. 121; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347; Manchester Bank *v.* Fellows, 28 N. H. 302; Bradley *v.* Davis, 26 Me. 45; Shelburne Nat. Bank *v.* Townsley, 107 Mass. 444; First Nat. Bank *v.* Wood, 51 Vt. 473; Foster *v.* McDonald, 5 Ala. 376; Dicken *v.* Hall, 87 Pa. St. 379; Whiteford *v.* Burckmeyer, 1 Gill, 127; Cabot Bank *v.* Warner, 10 Allen, 524; Hyslop *v.* Jones, 3 McLean, 69; Gilchrist *v.* Downell, 53 Mo. 591; Cayuga Co. Bank *v.* Bennett, 5 Hill, 236; Maspero *v.* Pedesclaux, 22 La. Ann. 227.

[2] Bussard *v.* Levering, 6 Wheat. 104; Williams *v.* Bank of United States, 2 Pet. 96; Bowling *v.* Harrison, 6 How. 248; Pierce *v.* Pendar, 5 Met. 352; Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177; Davis *v.* Gowen, 19 Me. 447; Vance *v.* Collins, 6 Cal. 535; Boyd *v.* City Sav. Bank, 15 Gratt. 501; Koch *v.* Bringer, 19 La. Ann. 183; John *v.* City Nat. Bank, 62 Ala. 529; Cabot Bank *v.* Warner, 10 Allen, 524.

where. A notice sent by mail from the holder's domicile would be insufficient. It must be served personally at the place of protest.[1] But all rules of the law merchant are subject to change by the local customs of business communities; and if it is the usage of a bank to transmit notices by the mail, all parties having dealings with the bank will be bound by the usage, if it is clear, definite and notorious.[2] So, also, where the place of payment and protest is a large city, in which the letters and other mail are delivered by carriers at the residences or places of business to which they are addressed; the courts very generally hold that the mail will in such cases be a proper medium of transmitting notices of dishonor, on the ground that there is then a personal service, instead of a mere deposit of notice in the post-office. In some of the States, statutes have been passed, authorizing the transmission of notice by the mail in such cases, but a statute is not believed to be necessary to the adoption of this exception to the general rule above stated.[3] But when the post-office and the letter carrier are used for the transmission of the notice, it must be shown that the notice was deposited in the post-office sufficiently early to enable it to be delivered by the letter carrier on the day when the party was entitled to receive notice of dishonor.[4]

[1] Bowling *v.* Harrison, 6 How. 248; Bank *v.* Slaughter, 7 Blackf. 133. But see *contra* Gindrat *v.* Mechanics' Bank, 7 Ala. 324; Greene *v.* Farley, 20 Ala. 324; Tyson *v.* Oliver, 43 Ala. 608; Philipe *v.* Harberlee, 45 Ala. 608.

[2] Bowling *v.* Harrison, 6 How. 248; Chicosee Bank *v.* Eager, 9 Metc. 583; Thorn *v.* Rice, 15 Me. 263; Gindrat *v.* Mechanics' Bank, 7 Ala. 324; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347.

[3] Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 83; Walters *v.* Brown, 15 Md. 292; Eagle Bank *v.* Hathaway, 5 Metc. 212; 3 Kent's Com. 107; 1 Parsons' N. & B. 481; 1 Am. Lead. Cas. 403; Thompson on Bills, 339. But where the statutes substitute mailing for personal service, whether there is a postal delivery or not, it is probable that the statute is necessary to change the rule of the law merchant, in the absence of postal delivery.

[4] Dobree *v.* Eastwood, 3 C. & P. 250; Smith *v.* Mullett, 3 Camp. 208; Walters *v.* Brown, 15 Md. 292.

And it would also seem to be necessary, if the notice was addressed to the party's place of business, that it should be received by postal delivery during business hours on the proper day. But there does not appear to have been any adjudication on this point.

It has also been held that, where the parties reside in some other than the place of protest, one party, who has previously received notice of dishonor, may notify the other by mail, although residing in the same place, provided the notice has been mailed with such dispatch, that the party for whom it was intended received it as early as if it had been addressed to him from the place of protest.[1]

§ 340. **How and where personal notice must be served.** Where personal service is required, and notice by mail disallowed, the notice must be sent to the party either at his residence or at his place of business. The delivery of notice at either place will be sufficient.[2] Where one has a settled place of business, it is customary to deliver the notice there during business hours instead of at the residence. And failure to find at the place of business the party or some agent with whom the notice may be left, will not necessitate a delivery of the notice at the residence. The rule is the same where the notice was left at the resi-

[1] Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177; *s. c.* 107 Mass. 444; Hartford Bank *v.* Stedman, 3 Conn. 489; Eagle Bank *v.* Hathaway, 5 Metc. 213; Manchester Bank *v.* Fellows, 28 N. H. 313; Van Brunt *v.* Vaughan, 47 Iowa, 145; Timms *v.* Delisle, 5 Blackf. 447; Foster *v.* McDonald, 8 Ala. 376; Warner *v.* Gilman, 17 Me. 360. But see McCrummen *v.* McCrummen, 17 Mart. (La.) 158; Patrick *v.* Beasley, 6 How. (Miss.) 609.

[2] Bank of Columbia *v.* Lawrence, 1 Pet. 578; Williams *v.* Bank of United States, 2 Pet. 96; Ireland *v.* Kip, 10 Johns. 491; Van Vechten *v.* Pruyn, 3 Kern. 549; Nevins *v.* Bank, 10 Mich. 547; Sanderson *v.* Reinstadler, 31 Mo. 483; Grinman *v.* Walker, 9 Iowa, 426; Bank of Geneva *v.* Howlett, 4 Wend. 328; Donner *v.* Remer, 21 Wend. 10.

dence.[1] And if the party has two or more places of business in the same town, the notice may be sent to either place.[2]

But a room or building, where the party is in the habit of resorting, but where he carries on no business, cannot be called his place of business, not even where he occupied such a room for the purpose of settling up his former business.[3] And where there is more than one office in the same building, the notice must be left in the particular office in which the party transacts his business.[4]

When the party cannot be found at the place of business or residence, where it is proposed to leave a notice of dishonor, the notice may be left with any clerk or agent, who seems to have the place in his charge. And it would not be necessary to show with whom it was left. The character of the person who receives the notice is of no consequence, if it has been left at the right place.[5] If no one can be found at the party's place of business or residence, with whom the notice may be left, it will be sufficient to put

[1] Lord *v.* Appleton, 15 Me. 579; Howe *v.* Bradley, 19 Me. 35; John *v.* City Nat. Bank, 62 Ala. 529; John *v.* Selma Bank, 57 Ala. 96; Crosse *v.* Smith, 1 Maule & Sel. 545; Goldsmith *v.* Blane, 1 Maule & Sel. 554; Bancroft *v.* Hale, Holt, 476; State Bank *v.* Henner, 16 Mart. (La.) 226; Thomson on Bills, 337.

[2] Commercial Bank *v.* Strong, 28 Vt. 316; Phillips *v.* Alderson, 5 Humph. 403.

[3] Bank of Columbia *v.* Lawrence, 1 Pet. 578; Stephenson *v.* Primrose, 8 Port. (Ala.) 155.

[4] Kleinman *v.* Boernstein, 32 Mo. 311; Bank of United States *v.* Corcoran, 2 Pet. 121.

[5] Jacobs *v.* Iowa, 2 La. Ann. 964; Bank of Louisiana *v.* Mansaker, 15 La. 115; Merz *v.* Kaiser, 20 La. Ann. 377; Mechanics' Banking Assn. *v.* Place, 4 Duer, 212; Edson *v.* Jacobs, 14 La. 494; Commercial Bank *v.* Gove, 15 La. 113; Mercantile Bank *v.* McCarthy, 7 Mo. App. 318; Housego *v.* Crone, 2 M. & W. 348; Cromwell *v.* Hynson, 2 Esp. 511; Blakely *v.* Grant, 6 Mass. 386; Fisher *v.* Evans, 5 Bin. 542. In Adams *v.* Wright, 15 Wis. 408, the notice was held to be insufficient where it was left with a boy in the yard, who said he was the indorser's son, and who went toward the house.

it into the keyhole of the door,[1] and *a fortiori*, if it is shoved under the door.

A man's boarding-house or hotel is his residence in the legal sense. And it will be sufficient, in the case of a private boarding-house, if the notice is left, in the absence of the party himself, with the proprietor, a servant of the house, or with a fellow-boarder.[2] But if one lives at a public hotel, notice must be left, either in his room, or at his room door,[3] or with the proprietor or clerk in the office.[4] In every case, the person delivering the notice, must first inquire for the party for whom the notice was intended.[5]

§ 341. **Mode of serving notice when parties reside in different places.** — When the parties reside in different places, it is impracticable in most cases, and certainly inconvenient, for personal service by special agent to be made. And the law permits the notice to be sent by mail. By depositing the notice in the post-office, addressed properly to the right party, the party sending the notice has done all that is required of him by the law, and the drawer or indorser to whom the notice was sent will be held bound, although the notice should be lost in the mail.[6] If there is any mistake

[1] Stewart *v.* Eden, 2 Caines, 121.

[2] Bank of United States *v.* Hatch, 6 Pet. 250, the court saying: "This is not like the case of a public inn, and a delivery to a mere stranger who happens to be there *in transitu*, and cannot be presumed to have any knowledge or intercourse with the party. Boarders at the same house may be presumed to meet daily and to feel some interest in the concerns of each other, and to perform punctually such common duties of life as this." See to the same effect McMurtrie *v.* Jones, 3 Wash. C. C. 206; Miles *v.* Hall, 12 Smed. & M. 332; Stedman *v.* Gooch, 1 Esp. 4.

[3] Howe *v.* Bradley, 19 Me. 31.

[4] Dana *v.* Kemble, 19 Pick. 112; Bradley *v.* Davis, 26 Me. 45; Graham *v.* Sangston, 1 Md. 59.

[5] Ashley *v.* Gunton, 15 Ark. 415.

[6] Bussard *v.* Levering, 6 Wheat. 102; Lindenberger *v.* Beall, 6 Wheat. 104; Miller *v.* Hackley, 5 Johns. 375; Parker *v.* Gordon, 7 East, 385; Kuth *v.* Weston, 3 Esp. 54; Sanderson *v.* Judge, 2 H. Bl. 509; Woodcock

in the address, the notice will not suffice, and the party entitled to notice will be discharged unless the circumstances are such as to excuse the holder from sending the notice.[1]

Other means of communication may be used, such as the telegraph or telephone. But since these means of communication are rarely used now for the transmission of notices of dishonor, it is probable that if the holder uses one of them instead of the mail, the notice will not be sufficient unless it has been received by the party to whom it was sent or by his agent.[2]

So, also, may the notice be sent by a special messenger, instead of by the mail. But if this is done, in order to hold the parties secondarily liable, the notices must be delivered to them at some time on the day when they would have been received had they been sent by mail.[3]

It has been held that where the party to be notified resides very far from any post-office, the holder must send it by a special messenger, in order to hold such a party.[4] But this has been very justly held to be an unreasonable burden to impose upon the holder, and that it is more reasonable to require the indorser or drawer to make inquiries at the nearest post-office, although he may not be in the habit of inquiring for letters at any post-office.[5] Whenever a special

v. Houldsworth, 16 M. & W. 126; Munn *v.* Baldwin, 6 Mass. 316; Cabot Bank *v.* Warner, 10 Allen, 524; Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177; Friend *v.* Wilkinson, 9 Gratt. 317; Farmers' Bank *v.* Gurnell, 26 Gratt. 137; Ellis *v.* Commercial Bank, 7 How. (Miss.) 294.

[1] Darcy *v.* Jones, 13 Vroom, 28.

[2] 2 Daniel's Negot. Inst., § 1004; 1 Parsons' N. & B. 487.

[3] Bancroft *v.* Hall, Holt, 476; Darbishire *v.* Parker, 6 East, 6; Jarvis *v.* St. Croix Mfg. Co., 23 Me. 287; Doobree *v.* Eastwood, 3 C. & P. (14 Eng. C. L. R.) 250; Parsons *v.* Crallan, 2 J. P. Smith, 404; Bank of Columbia *v.* Lawrence, 1 Pet. 578; Van Vechten *v.* Pruyn, 3 Kern. 549.

[4] Fisk *v.* Jackman, 19 Me. 467; Bedford *v.* Hickman, 1 Yerg. 166; Farmers' Bank *v.* Butler, 3 Lit. 498.

[5] State Bank *v.* Ayres, 2 Halst. 130; 1 Am. Lead. Cas. 403; Story on Bills, 297.

messenger is required, the expense of sending one is chargeable to the party receiving notice.[1]

§ 342: **To what post-office notice should be addressed.**— If the party to be notified resides at one place and has his place of business at another, the notice may be sent to the post-office of either place; unless it be known that he receives his letters at one place, when it must be sent there.[2] But if the bill or note is protested at a place where the drawer or indorser resides, and his place of business is elsewhere, the notice must be sent to him at his residence, instead of being addressed to him at his place of business.[3] It is not necessary that the post-office, to which the notice is addressed, should be at the domicile of the indorser or drawer, in order that the notice may be sufficient. It satisfies the requirements of the law merchant, if it be for the time being his actual residence.[4] And so, if the party resides at one place for a part of the year, and for the rest of the year at another place, the notice may be sent to either place, provided the holder does not know that the party customarily receives his letters at one of these post-offices.[5] But both residences must be more or less permanent. If one is temporarily sojourning at some place distant from his permanent residence, notice should be sent to the residence.[6] But where a member of Congress or of a State legislature is in attendance upon these bodies, his residence being else-

[1] Pearson *v.* Crallan, 2 J. P. Smith, 404.

[2] Williams *v.* Bank of United States, 2 Pet. 96; Bank of United States *v.* Carneal, 2 Pet. 549; Reed *v.* Payne, 16 Johns. 218; Montgomery Co. Bank *v.* Marsh, 3 Seld. 481; Cuyler *v.* Nellis, 4 Wend. 398; Van Vechten *v.* Pruyn; 3 Kern. 549; Bank of Geneva *v.* Howlett, 4 Wend. 328.

[3] Van Vechten *v.* Pruyn, 3 Kern. 549; Story on Bills, § 297.

[4] Young *v.* Durgin, 15 Gray, 264.

[5] Exchange, etc., *v.* Boyce, 3 Rob. (La.) 307; Chouteau *v.* Webster, 6 Met. 1.

[6] Stewart *v.* Eden, 2 Caines, 121; Walker *v.* Stetson, 14 Ohio St. 89; Runyon *v.* Mountfort, Busbee, 371.

where, notice of dishonor may be sent to him at the capital, provided it is mailed to him during the session. It will not be sufficient if it be sent to the capital after the adjournment of the legislative body.[1]

Where the party does not reside at a place where there is a post-office, notice should be sent to the nearest post-office, unless it is known that he is in the habit of receiving his letters at another post-office, when the notice should be sent to the latter.[2] On the other hand, where there are two or more branch post-offices in the same town or city, it will be sufficient to address the notice to the town generally, unless the holder knows at which post-office the party usually receives his mail, when it should be addressed to him at that post-office.[3] Indeed, it is always sufficient to address a notice generally to the city or town in which the party resides, unless the holder knows the street address of the party, and he lives in a city in which there is a postal delivery. Under other circumstances, a more particular address is not required.[4] It has been held[5] and likewise denied[6] that a notice will be suffi-

[1] Chouteau *v.* Webster, 6 Met. 1; Maar *v.* Johnson, 9 Yerg. 1; Bayley's Admr. *v.* Chubb, 16 Gratt. 284; Graham *v.* Sangston, 1 Md. 59. But see Walker *v.* Tunstall, 3 How. (Miss.) 259; 2 Sm. & M. 638, where it is held that notice sent to the capital is only sufficient when the party has no other known place of residence. See also Hill *v.* Norvell, 3 McLean, 583, where it is held that notice shall be sent to the permanent residence of the Congressman.

[2] Bank of Columbia *v.* Lawrence, 1 Pet. 582; Mercer *v.* Lancaster, 5 Barr, 160; Rand *v.* Reynolds, 2 Gratt. 171; Follain *v.* Dupre, 11 Rob. (La.) 454; Jones *v.* Lewis, 8 W. & S. 14; Bank of Geneva *v.* Howlett, 4 Wend. 328.

[3] Saco Nat. Bk. *v.* Sanborn, 63 Me. 340; Morton *v.* Westcott, 8 Cush. 425; Cabot Bank *v.* Russell, 4 Gray, 167; Burlingame *v.* Foster, 128 Mass. 125; Down *v.* Remer, 21 Wend. 10; Bank of Manchester *v.* Slason, 13 Vt. 334.

[4] True *v.* Collins, 3 Allen, 440. But see, *contra*, Walter *v.* Haynes, Ryan & M. 149.

[5] Weakly *v.* Bell, 9 Watts, 273; Bank of U. S. *v.* Lane, 3 Hawks, 453; Story on Bills, § 297; 1 Parsons' N. & B. 497.

[6] Beenel *v.* Tournillon, 6 Rob. (La.) 500.

cient if addressed to the shire or county town, although there is a post-office nearer to the residence of the party, and one from which the party usually received his mail. In every case of sending notice to any part of the United States, it is necessary that the name of the State, as well as of the town, should be contained in the address. An omission of the name of the State would invalidate the notice, unless actually received.[1]

The party to the commercial paper may always give special directions as to what postal address the notice should be sent. And when given, they must be followed, irrespective of the question of residence and customary post-office address.[2] And where one, in signing his name to the paper, adds an address, the law implies that he intends thereby to direct the notice of dishonor to be sent to that address.[3] So, whenever a party holds himself out in any way as a resident of a certain place, he is thereafter estopped from denying that he is a resident of that place, in order to invalidate the notice sent there in reliance upon that representation.[4] In the line of this principle, it has been held in England that the place of the date of a bill is presumed to be the residence of the drawer; and if the

[1] Beckwith *v.* Smith, 22 Me. 125.

[2] Crowley *v.* Barry, 4 Gill, 194; Bell *v.* Hagerstown Bank, 7 Gill, 210; Dicken *v.* Hall, 87 Pa. St. 379; Eastern Bank, *v.* Brown, 17 Me. 356; Hodges *v.* Galt, 8 Pick. 251; Carter *v.* Union Bank, 7 Humph. 548; Bank of Columbia *v.* Magruder, 6 Har. & J. 172; Tyson *v.* Oliver, 43 Ala. 455; Shelton *v.* Braithwaite, 8 M. & W. 252. And the fact that the transmission of the notice to the postal address named, will consume more time than its transmission to the party's ordinary address, does not affect the question. Shelton *v.* Braithwaite, *supra.*

[3] Morris *v.* Husson, 4 Sandf. 93; Bartlett *v.* Robinson, 39 N. Y. 187; Manse *v.* Moors, Ryan & M. 149; Burmester *v.* Barron, 17 Q. B. 828; Clarke *v.* Sharpe, 3 M. & W. 166; Peters *v.* Hobbs, 25 Ark. 67; Davis *v.* Bank of Tennessee, 4 Sneed, 390; Baker *v.* Moris, 25 Bab. 138; Farmers' Bank *v.* Battle, 4 Humph. 86; Carter *v.* Union Bank, 7 Humph. 548.

[4] Lewis Falls Bank *v.* Leonard, 43 Me. 144.

notice of dishonor is sent to that place, it will be sufficient, even though the drawer does not reside there.[1] But in the United States, it is held that a notice sent to the place of the date is only sufficient as long as it is not proven that the drawer resides elsewhere.[2] Some of the cases also hold that the place of the date is presumptively the residence of the indorsers.[3] But it would seem to require peculiar circumstances to support this presumption. Since the indorsement need not have been made at the place of the date, there is probably, independently of special circumstances, no presumption for or against the place of date being the residence of the indorser.[4]

The holder has a right, in the absence of a notice of a change of residence by the drawer or indorser, to presume that his residence is the same as it was, when the bill or note was drawn or indorsed.[5] But, where the removal of the drawer or indorser from his prior residence had been a matter of peculiar notoriety, and the holder's relations to the other party were such that it was likely that he would hear of it, the jury might presume from these facts that the holder knew of the change of residence.[6]

[1] Burmester *v.* Barron, 17 Q. B. 828; Clarke *v.* Sharpe, 3 M. & W. 166.

[2] Lowery *v.* Scott, 24 Wend. 858; Hill *v.* Varrell, 3 Greenl. 233; Barnwell *v.* Mitchell, 3 Conn. 101; Pierce *v.* Strathers, 27 Pa. St. 249; Fisher *v.* Evans, 5 Binn. 541; Foard *v.* Johnson, 2 Ala. 565; Robinson *v.* Hamilton, 4 Stew. & P. 91. In Alabama, it is held that the place of the date is not even *prima facie* presumed to be the residence.

[3] Moodie *v.* Morrall, 3 Const. R (S. C.) 367; Lasscer *v.* Whitely, 10 Md. 98; Branch *v.* Pierce, 3 Ala. 321.

[4] Wood *v.* Corl, 4 Met. 203; Page *v.* Prentice, 5 B. Mon. 7; Lowery *v.* Scott, 24 Wend. 358; Gilchrist *v.* Donnell, 53 Mo. 591.

[5] Knott *v.* Venable, 42 Ala. 186; Farmers' Bank *v.* Harris, 2 Humph. 311; Harris *v.* Memphis Bank, 4 Humph. 519; Saco Nat. Bank *v.* Sanborn, 63 Me. 340; Dunlap *v.* Thompson, 5 Yerg. 67; Requa *v.* Collins, 51 N. Y 148; Bank of Utica *v.* Phillips, 3 Wend. 408; Ward *v.* Perrin, 54 Barb. 89; First Nat. Bank *v.* Wood, 51 Vt. 473; Bank of Utica *v.* Davidson, 5 Wend. 588.

[6] Planters' Bank *v.* Bradford, 4 Humph. 39; Harris *v.* Memphis Bank,

§ 343. **What is meant by "residing at the same place."** — It is somewhat difficult to determine at times who are to be regarded as living in the same place, and therefore may require personal service of a notice of dishonor, instead of its transmission through the mail. On the ground that the mail cannot be used as a means of transmission of notices, except when the notices are addressed and must be sent to another post-office, it is held that all persons are deemed for this purpose to reside in the same place, who get their mail out of the same post-office. And the rule is made to apply to persons who reside several miles distant from the place.[1] But where the party has no regular place of business in the city or town, where the holder resides, and he lives outside of the corporate limits, it has been held to be reasonable and permissible to deposit the notice in the post-office, instead of sending it to the party's residence by special messenger.[2] On the other hand, it has been held that where there are two or more post-offices within the corporate limits of a town or city, between which there is a regular exchange of mail, parties receiving their mail from different post-offices

4 Humph. 519; Farmers' M. Bank *v.* Harris, 2 Humph. 311; McVeigh *v.* Allen, 29 Gratt. 596; Bank of Utica *v.* Phillips, 3 Wend. 408.

[1] Shelburne Falls Nat. Bank *v.* Townsley, 102 Mass. 177; Farmers' Bank *v.* Battle, 4 Humph. 86; Eagle Bank *v.* Hathaway, 5 Met. 212; Ireland *v.* Kip, 10 Johns. 490; 11 Johns. 231; Forbes *v.* Omaha Nat. Bank, 10 Neb. 338; Barker *v.* Hall, Mart. & Yerg. 183; Ransom *v.* Mack, 2 Hill, 587; Louisiana State Bank *v.* Rowell, 6 Mart. 506; Patrick *v.* Beazley, 6 How. (Miss.) 609.

[2] Bank of Columbia *v.* Lawrence, 1 Pet. 578; Walker *v.* Bank of Augusta, 3 Kel. 486; Gist *v.* Lybrand, 3 Ohio 307; Jones *v.* Lewis, 8 Watts & S. 14; Foster *v.* Smeath, 2 Rich. 338; Bondurant *v.* Everett, 1 Met. (Ky.) 658; Bank of United States *v.* Norwood, 1 Harr. & J. 423; Carson *v.* Bank of Alabama, 4 Ala. 148; Timms *v.* Delisle, 5 Blackf. 447; Bell *v.* State Bank, 7 Blackf. 457; Walker *v.* Bank of Missouri, 8 Mo. 704; Barrett *v.* Evans, 28 Mo. 323. In the last case, it was claimed that the corporate limits of a city define the limits of the requirement of personal notice.

within the corporate limits will be considered as residing in different places, for the purpose of determining whether personal service of notice of dishonor is required.[1]

§ 344. **What constitutes notice — May be verbal or written.** — Mere knowledge of dishonor does not amount to notice.[2] Notice consists of the communication of the fact of dishonor by the person whose duty it is to give the notice. It is not necessary that the communication should be in writing; it may be verbal.[3] And when it is verbal, it seems that the notice is less strictly construed, the most meagre sort of notice being held to be sufficient; for since a verbal notice is of necessity served personally, the party notified has an opportunity to ask for a more explicit notice, if he does not fully understand the one given.[4]

In order that the notice may be complete, it should contain (1) a sufficient description of the bill or note; (2) a statement that it had been presented for acceptance or payment, and had been dishonored; (3) the statement that the paper had been protested, and (4) an announcement of the intention of the holder to look for payment to the party addressed.

[1] Shaylor *v.* Mix, 4 Allen, 351; Bell *v.* Hagerstown Bank, 7 Gill, 216; Brindley *v.* Barr, 3 Harr. (Del.) 419; Louisiana State Bank *v.* Rowell, 18 Mart. (La.) 506; Farmers' Bank *v.* Butler, 3 Litt. 498; Curtis *v.* State Bank, 6 Black, 312; Gist *v.* Lybrand, 3 Ohio, 307.

[2] Juniata Bank *v.* Hale, 16 Serg. & R. 157; Brown *v.* Ferguson, 4 Leigh, 37; Bank of Old Dominion *v.* McVeigh, 29 Gratt. 559; 26 Gratt. 852; Story on Bills, § 375.

[3] Tindal *v.* Brown, 1 T. R. 167; Housego *v.* Cowne, 6 L. J. Exch. 110; Crosse *v.* Smith, 1 Maule & S. 545; Bank *v.* Brooking, 2 Litt. 41; Glascow *v.* Pratte, 8 Mo. 366; Cuyler *v.* Stevens, 4 Wend. 506; Merritt *v.* Woodbury, 14 Iowa, 299; First Nat. Bank *v.* Ryerson, 23 Iowa, 508; Gilbert *v.* Dennis, 3 Met. 495; Boyd's Admr. *v.* City Sav. Bank, 15 Gratt. 501; Thompson *v.* Williams, 14 Cal. 160; Pierce *v.* Schaler, 55 Cal. 406; 1 Parsons' N. & B. 336; Story on Notes, § 341.

[4] Metcalfe *v.* Richardson, 11 C. B. (73 E. C. L. R.) 1011; Phillips *v.* Gould, 8 C. & P. (34 E. C. L. R.) 355; Thompson *v.* Williams, 14 Cal. 162.

§ 345. **A sufficient description of the bill or note.** — The description, when properly made, should give the date of the paper, by whom executed, payable to whom, for what amount, when due, by whom indorsed, and in the case of bills of exchange, on whom it is drawn. If payable at a particular place, the place should be stated.

When these ordinary elements are properly described, the holder has done all that can be required, and if the party notified is misled because he had executed more than one paper on the same day, for the same amount, payable to the same person, on the same day, and indorsed by the same persons, the instruments differing from each other as in one case, only in the numbers marked on the margin, the holder will not be responsible. He cannot be expected to include in his notice a description of unusual marks and characteristics.[1] So, also, is it unnecessary to state who the holder is or on whose behalf demand is made, it being presumed that the party giving the notice is the holder or the notarial agent of the holder.[2] Where several notes differed only in the day of payment, it was held by the New York Court of Appeals, that the day of maturity of the note which had been dishonored must be expressly stated in the notice, and cannot be inferred from the date of the protest. In the notice it was stated that the note "was duly protested for non-payment on the day that the same became due."[3] It would seem impossible for the party to be misled in such a case, and one is not surprised to learn that in the second trial of the same case, it was held that

[1] Hodges *v.* Schuler, 22 N. Y. 115.

[2] Shed *v.* Brett, 1 Pick. 401; Woodthrope *v.* Lawes, 2 M. & W. 109; Mills *v.* Bank of United States, 11 Wheat. 431; Klockenbaum *v.* Pierson, 16 Cal. 375; Walker *v.* State Bank, 8 Miss. 704; Howe *v.* Bradley, 19 Me. 35; Bradley *v.* Davis, 29 Me. 45. Harrison *v.* Ruscoe, 15 M. & W. 231.

[3] Cook *v.* Litchfield, 5 Seld. 286; overruling Cook *v.* Litchfield, 5 Sandf. 340.

the party notified had not been misled, and consequently is not discharged from liability.[1]

But it is a ruling of the courts, to which there is probably no exception, that if the party notified is not misled by any misdescription of the note or bill, or of any of its elements, he cannot claim a discharge from liability on the ground that the description was not complete.[2] But if the party was in fact misled by the omission or misstatement, he will be discharged.

§ 346. **Statement of dishonor and protest.** — It is universally held to be necessary that the notice should indicate on its face, by express statement or by necessary or reasonable implication, that the paper had been presented and dishonored.[3] But dishonor will not be inferred from the simple statement of non-payment, if it be not accompanied by a statement that presentment and demand had been made.[4] Nor will it be sufficient to say that payment

[1] Cook *v.* Richfield, 2 Bosw. 147.

[2] Gill *v.* Palmer, 29 Conn. 54; Messenger *v.* Southey, 1 M. & G. (39 E. C. L. R.) 76; Stockman *v.* Parr, 11 M. & W. 809; Mellersh *v.* Rippen, 7 Exch. 578; Haines *v.* Dubois, 1 Vroom, 259; Cayuga Bank *v.* Warden, 1 Comst. 415; Cook *v.* Litchfield, 5 Seld. 279; Beals *v.* Peck, 12 Barb. 245; Youngs *v.* Lee, 18 Barb. 187; Housatonic Bank *v.* Laflin, 5 Cush. 546; Wynn *v.* Alden, 4 Dev. 163; Reynolds *v.* Appleman, 41 Md. 615; Mills *v.* Bank of United States, 11 Wheat. 431; Dennistoun *v.* Stewart, 17 How. 606; Kilgore *v.* Buckley, 14 Conn. 362; Thompson *v.* Williams, 14 Cal. 162; Tobey *v.* Lennig, 14 Pa. St. 483; Ross *v.* Planters' Bank, 5 Humph. 335; Bank of Alexandria *v.* Swann, 9 Pet. 33; Wood *v.* Watson, 53 Me. 300, Bank of Rochester *v.* Gould, 9 Wend. 279; Reedy *v.* Seixas, 2 Johns. Cas. 337; Snow *v.* Perkins, 2 Mich. 238; Rowan *v.* Odenheimer, 5 Smed. & M. 44; Carter *v.* Bradley, 19 Me. 62; Smith *v.* Whiting, 12 Mass. 6; Moorman *v.* Bank of Alabama, 12 Ala. 353; McCune *v.* Belt, 38 Mo. 291; Downer *v.* Remer, 23 Wend. 670; *s. c.* 25 Wend. 277.

[3] Solarte *v.* Palmer, 7 Bing. 530 (20 E. C. L. R); 5 Moo. & P. 475; 1 Cromp. & J. 417; 1 Tyrw. 371; Hedger *v.* Steavenson, 2 M. & W. 799; 5 Dowl. 771; Lewis *v.* Gompertz, 6 M. & W. 402; Wilkinson *v.* Adams, 1 Ves. & B. 466; Boneton *v.* Welsh, 3 Bing. N. C. 688.

[4] Page *v.* Gilbert, 60 Me. 488; Union Bank *v.* Humphreys, 48 Me. 172;

was demanded, if it is not also stated that the paper had been presented.[1] But the simple statement that the paper had been "dishonored" is sufficient, without any further statement of presentment and demand, since these other facts may be inferred from the fact of dishonor.[2] And it will also be sufficient if the statement of non-payment is coupled with a statement of protest,[3] or words from which the fact of protest may be implied, such as "your bill is unpaid, *noting* 5 s."[4] But it is not necessary for the no-

Gilbert *v.* Denis, 3 Met. 495; Phillips *v.* Gould, 8 C. & P. (34 E. C. L. R.) 355; Furze *v.* Sharwood, 2 Q. B. (42 E. C. L. R.) 338; Strange *v.* Price, 10 Ad. & El. (34 E. C. L. R.) 125; Messenger *v.* Southey, 1 Man. & G. (39 E. C. L. R.) 76; Boneton *v.* Welsh, 3 Bing. N. C. (32 E. C. L. R.) 688; Hartley *v.* Case, 1 Barn. & C. 339; Graham *v.* Langston, 1 Md. 60; Armstrong *v.* Thurston, 11 Md. 148; Pinkham *v.* Macy, 9 Met. 174; Clark *v.* Eldridge, 13 Met. 96; Lockwood *v.* Crawford, 18 Conn. 361; Ething *v.* Schuylkill Bank, 2 Barr. 356; Sinclair *v.* Lynch, 1 Spears, 244; Townsend *v.* Lorain, Bank, 2 Ohio St. 355; Arnold *v.* Kinloch, 50 Barb. 44. But see *contra* Cromer *v.* Platt, 37 Mich. 132, where it is held that the rule of the text is too severe. See also Robson *v.* Curlewis, Car. & M. 378; 2 Q. B. 421. And where the paper is payable at a bank, it will suffice to state the fact of non-payment, since it is not necessary then to make a formal presentment. Gilbert *v.* Dents, 3 Met. 495.

[1] Musson *v.* Lake, 4 How. 262.

[2] Lewis *v.* Gompertz, 6 M. & W. 400; Rowland *v.* Sprinjett, 14 M. & W. (7 E. C. L. R.) 7; Shelton *v.* Braithwaite, 7 M. & W. 436; Stocken *v.* Collin, 9 C. P. (38 E. C. L. R.) 653; *s. c.* 7 M. & W. 515; King *v.* Bickley, 2 Q. B. 419; Edmunds *v.* Cates, 2 Jur. 183; Woodthorpe *v.* Lawes, 2 M. & W. 109; Smith *v.* Boulton, 1 Hurl. & W. 3.

[3] Mills *v.* Bank of United States, 11 Wheat. 431; Bank of Alexandria *v.* Swann, 9 Pet. 33; Howe *v.* Bradley, 19 Me. 31; Housatonic Bank *v.* Laflin, 5 Cush. 546; Kilgore *v.* Buckley, 14 Conn. 362; Beals *v.* Peck, 12 Barb. 445; Cook *v.* Litchfield, 5 Sandf. 330; 5 Seld. 279; Youngs *v.* Lee, 2 Kern. 551; Brewster *v.* Arnold, 1 Wis. 264; Smith *v.* Little, 10 N. H. 526; Burgess *v.* Vreeland, 4 N. J. 71; Burkham *v.* Trowbridge, 9 Mich. 209; Wheaton *v.* Wilmarth, 13 Met. 422; McFarland *v.* Pico, 8 Cal. 636; Eastman *v.* Truman, 24 Cal. 383; Saltmarsh *v.* Tuthill, 13 Ala. 390; Crawford *v.* Branch Bank, 7 Ala. 205; Spies *v.* Newbury, 2 Doug. (Mich.) 495.

[4] Armstrong *v.* Christiana, 6 C. B. (57 E. C. L. R.) 687; Hedger *v.* Steavenson, 2 M. & W. 799; 5 Dowl. 771; Everard *v.* Watson, 1 El. & B.

tice to state when the demand was made, or at what time the paper fell due, if the fact and time of dishonor are stated;[1] nor that the party had the paper in his possession when he demanded payment;[2] nor that the maker or acceptor was absent when the presentment was made.[3] It has been held that in the case of foreign bills and notes the notice should state the fact of protest,[4] although it is not necessary, as it was once supposed, that a copy of the protest should accompany the notice.[5] And it has been held that even the statement of protest was unnecessary, if the paper was in fact protested.[6] It has been held that if the party was not misled, he would still be liable, although the notice misstated the time of presentment and demand.[7] But it has been held otherwise by some of the courts, on the ground that the notice is in such a case a necessary notification of the discharge of the party addressed, and that the party has a right to presume the correctness of the statements of the notice.[8]

801; Mellersh *v.* Rippen, 7 Exch. 578; De Wolf *v.* Murray, 2 Sandf. 166; Grudgeon *v.* Smith, 6 Ad. & El. (33 Eng. C. L. R.) 499; 2 Nev. & P. 303.

[1] Mills *v.* Bank of United States, 11 Wheat. 431; Wynn *v.* Alden, 4 Den. 163; Denegrie *v.* Hiriatt, 6 La. Ann. 100; Fleming *v.* Fulton, 6 How. (Miss.) 473. Reynolds *v.* Appleman, 41 Md. 615; Thompson *v.* Williams, 4 Cal. 164.

[2] Mainer *v.* Spurlock, 9 Rob. (La.) 161.

[3] Sanger *v.* Stimpson, 8 Mo. 260.

[4] See Rogers *v.* Stephens, 2 T. R. 713; Rollins *v.* Gilson, 3 Camp. 334; 1 M. & S. 288; Byles on Bills [*277], 420; Thompson on Bills, 334.

[5] Wallace *v.* Agry, 4 Mason, 336; Goodman *v.* Harvey, 4 Ad. & El. (31 E. C. L. R.) 870; Robins *v.* Gibson, 1 Maule & S. 288; Ex parte Lowenthal, L. R. 9 Ch. 591; Cromwell *v.* Hynson, 2 Esp. 511; Dennistoun *v.* Stewart, 17 How. 606; Lenox *v.* Leverett, 10 Mass. 1; Wells *v.* Whitehead, 15 Wend. 527.

[6] Ex parte Lowenthal, L. R. 9 Ch. 591; 2 Ames B. & N. 452.

[7] Crocker *v.* Getchell, 23 Me. 392; Ontario Bank *v.* Petrie, 3 Wend. 456; Journey *v.* Pierce, 2 Houst. 176.

[8] Ransom *v.* Mack, 2 Hill, 587; Etting *v.* Schuylkill Bank, 2 Pa. St. 355; Reynolds *v.* Appleman, 41 Md. 615; Townsend *v.* Lorain Bank, 2 Ohio St. 345; Routh *v.* Robertson, 11 Smed. & M. 362.

§ 347. **Statement that the holder looks for payment to party notified.** — It was formerly held that the notice should contain the express statement that the holder looks for payment to the party to whom the notice is addressed.[1] But it is now held to be unnecessary, on the ground that this intention of the holder is fairly implied from the act of sending the notice. The sole object of the notice is to hold the party addressed liable as drawer or indorser.[2]

§ 348. **Allegation and proof of notice.** — It is, of course, necessary to allege and prove notice or to show sufficient cause for not sending the notice. The burden of proof is on the plaintiff, in the suit. And he may either show that the notice has been actually received by the defendant, either affirmatively or by the proof of admission and acknowledgments of the defendant,[3] or may show that all the steps required by law have been taken to get the notice to the defendant, in which case the defendant is presumed to have received the notice.[4] And where notice is allowed by law to be sent by mail, it will be sufficient proof of notice, to show that the letter, containing the notice was deposited in the post-office, on the proper day, properly addressed.[5]

[1] Tindall *v.* Brown, 1 T. R. 169; Solarte *v.* Palmer, 7 Bing. 530 (20 E C. L. R.)

[2] Bank of United States *v.* Carneal, 2 Pet. 543; Cowles *v.* Harts, 3 Conn. 517; Warren *v.* Gilman, 5 Shep. 360; Bank of Cape Fear *v.* Seawell, 2 Hawks, 560; Townsend *v.* Lorain Bank, 2 Ohio St. 345; Shrieve *v.* Duckham, 1 Litt. 194; Barstow *v.* Hiriart, 6 La. Ann. 98; Farze *v.* Sharwood, 2 Q. B. (42 E. C. L. R.) 388; Metcalf *v.* Richardson, 20 Eng. L. & Eq. 301; Caunt *v.* Thompson, 7 C. B. (62 E. C. L. R.) 400; Chard *v.* Fox, 14 Q. B. (68 E. C. L. R.) 200; King *v.* Buckley, 2 Q. B. (42 E. C. L. R.) 419; Burgess *v.* Vreeland, 4 N. J. 71.

[3] Dickens *v.* Beal, 10 Pet. 572; Todd *v.* Neal's Admr. 49 Ala. 266; Donegan *v.* Wood, 49 Ala. 242; First Nat. Bk. *v.* Wood, 51 Vt. 471.

[4] Lambert *v.* Ghiselin, 9 How. 552; Saco Nat. Bank *v.* Sanborn, 63 Me. 340; Shed *v.* Brett, 1 Pick. 401.

[5] Bussard *v.* Levering, 6 Wheat. 102; Dickens *v.* Beal, 10 Pet. 572; Shed *v.* Brett, 1 Pick. 401; Briggs *v.* Hervey, 130 Mass. 186.

The fact of mailing the notice may be proved by the testimony of the officer or clerk who mailed it. And his testimony concerning the contents of the notice, is admissible without first proving that a demand had been made for a production of the letter in open court.[1] And when the notary or other agent, who sent out the notice, is dead, the fact may be established by the introduction of the books of such agent, in which he had, in due course of business, made a memorandum of the notice having been sent. This sort of secondary evidence has been admitted, not only in the case of notaries,[2] but also in the case of cashiers, book-keepers, messengers and other clerks.[3] But, in order that the entries in any person's books may be admitted as evidence of the facts therein stated, the person who wrote them must himself be dead. If he is alive, the entries are inadmissible, although he made them as the book-keeper of the notary, who is dead.[4] And, of course, the entries are sufficient evidence of notice, only so far as the facts stated therein will prove a compliance with the law in respect to notice.[5]

The protest of bills and notes is now made by statute evidence of notice, when the fact of notice is stated therein.[6]

But in any case, it is not necessary that the testimony should prove directly and conclusively that the notice had been mailed or served, provided the facts proven raise a *prima facie* presumption of the notice having been sent.

[1] Lindenberger *v.* Beall, 6 Wheat. 104; Kine *v.* Beaumont, 3 Brod. & B. 288; 7 J. B. Moore, 112; Roberts *v.* Bradshaw, 1 Stark. 28; Eagle Bank *v.* Chapin, 3 Pick. 180; Leavitt *v.* Simes, 3 N. H. 14.

[2] Nicholls *v.* Webb, 8 Wheat. 326; Homes *v.* Smith, 16 Me. 181; Price *v.* Torington, 1 Salk. 285; Halliday *v.* Martinet, 20 Johns. 168; Nichols *v.* Goldsmith, 7 Wend. 160.

[3] Welsh *v.* Barratt, 15 Mass. 380; Nichols *v.* Goldsmith, 7 Wend. 160; Ocean Nat. Bank *v.* Carll, 16 N. Y. S. C. (10 Hun) 241.

[4] Wilbur *v.* Seldon, 6 Cow. 162; Gawtry *v.* Doane, 51 N. Y. 90.

[5] Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Halliday *v.* Martinet, 20 Johns. 168.

[6] See *ante*, § 327.

Thus, proof that a letter, containing the notice, was put with other letters, intended to be mailed, and that the package of letters was deposited in the post-office, was held to be sufficient evidence of the mailing of the notice.[1] But the testimony must be positive as to the fact that notice of dishonor was prepared for the mail in that particular case. It would not be sufficient to prove that a notice of dishonor was mailed, without showing that the notice of dishonor referred to the paper on which the action is brought.[2]

A post-mark is *prima facie*, but not conclusive evidence that notice was mailed on the day named.[3] Nor is it sufficient for a witness to state that notice was sent, without stating by whom.[4]

It is always sufficient to show that due diligence had been exercised in sending or giving the proper notice to the defendant. If the facts are not in dispute, it is a question of law for the court to determine whether they show that due diligence had been exercised. But if the facts are in dispute, it is a question for the jury.[5] And when due diligence has been exercised in the sending of the notice, the holder is not obliged to send a second notice when

[1] Commercial Bank *v.* Strong, 28 Vt. 316; Skilbe *v.* Garbett, 7 Q. B. 846. See Miller *v.* Hackles, 5 Johns. 375; Flack *v.* Green, 3 Gill & J. 474; Brailsford *v.* Williams, 15 Md. 150.

[2] Couch *v.* Sherrill, 17 Kan. 622.

[3] New Haven Co. Bank *v.* Mitchell, 15 Conn. 206; Rex *v.* Plumer, Rus. & Ry. 264; Langdon *v.* Hulls, 5 Esp. 156; Arcangelow *v.* Thompson, 2 Camp. 620; Fletcher *v.* Braddyll, 3 Stark. 64; Early *v.* Preston, 1 Pat. & Heath, 228; Stoker *v.* Collier, 7 M. & W. 545; 9 C. & P. (38 E. C. L. R. 653. Genuineness of the post-mark may be proved by any witness. Woodcock *v.* Houldsworth, 16 M. & W. 124; Fletcher *v.* Braddyll, 3 Stark. 64.

[4] Hawkes *v.* Salter, 1 M. & P. 750.

[5] Rhett *v.* Poe, 2 How. 457; Harris *v.* Robinson, 4 How. 336; Bank of Columbia *v.* Lawrence, 1 Pet. 578; Wheeler *v.* Field, 6 Met. 290; Belden *v.* Lamb, 17 Conn. 442; Bank of Utica *v.* Bender, 21 Wend. 643; Walker *v.* Stetson, 14 Ohio St. 89; Lane *v.* Bank of W. Tenn., 9 Heisk. 419.

he discovers that the first notice was sent to the wrong place.[1]

It was once held that an averment of presentment, demand, notice and protest could not be supported by proof of facts which tend to excuse the failure to make presentment and demand, but to issue the protest and notice of dishonor. A special averment was held to be necessary under these circumstances.[2] But this view does not meet with favor in the United States, where it is generally held that facts may be introduced in evidence to support such an allegation, which excuse the want of protest and notice.[3] And even in England, the law on this subject does not appear to be very clearly settled.[4]

[1] Lambert *v.* Ghiselin, 9 How. 552. But see *contra* Beale *v.* Parish, 20 N. Y. 407.

[2] Byles on Bills [*418, *419], 618, 619, citing Burgh *v.* Legge, 5 M. & W. 418. See Terry *v.* Parker, 6 Ad. & E. 502; *s. c.* N. & P. 752; Carter *v.* Flower, 16 M. & W. 749.

[3] Jones *v.* Fales, 4 Mass. 245; City Bank *v.* Cutter, 3 Pick. 414; Taunton Bank *v.* Richardson, 5 Pick. 436, 444; North Bank *v.* Abbott, 13 Pick. 465; Kent *v.* Warner, 12 Allen, 561; Harrison *v.* Bailey, 99 Mass. 620; Armstrong *v.* Chadwick, 127 Mass. 756; Camp *v.* Bates, 11 Conn. 488, 493; Norton *v.* Lewis, 2 Conn. 478; Windham Bank *v.* Norton, 22 Conn. 214; Tobey *v.* Berley, 26 Ill. 426; Kennan *v.* McRae, 7 Port. (Ala.) 176; Purchase *v.* Mattison, 6 Duer, 592; Stewart *v.* Eden, 2 Caines, 127; Ogden *v.* Conley, 2 Johns. 274; Williams *v.* Matthews, 3 Cow. 262. See also Shirley *v.* Fellows, 9 Port. 300; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 799; Spann *v.* Balzell, 1 Fla. 302.

[4] Brownell *v.* Bonney, 1 Q. B. 39; 3 M. & Ry. 359; *s. c.* D. & L. 151; Baldwin *v.* Richardson, 1 B. & C. 245; *s. c.* 2 D. & Ry. 285; Firth *v.* Thrush, 8 B. & C. 387.

CHAPTER XVIII.

CIRCUMSTANCES WHICH WILL EXCUSE WANT OF PRESENTMENT, PROTEST AND NOTICE.

SECTION 354. War, political and social disturbances, pestilence, conflagration, floods, etc.
355. Drawing without right to expect acceptance and payment.
356. What relations between the parties will excuse want of presentment and notice.
357. When the note is void.
358. Inability to discover the address of parties.
359. What is due diligence in making inquiries after parties.
360. Sickness and death of, or accident to the holder.
361. Delay in receipt of the paper.
362. When party has received security for his secondary liability.
363. Waiver of presentment and notice.
364. Waivers made after execution and before maturity of the paper.
365. Waivers after maturity.
366. What will not excuse default in presentment and notice.
367. Transfer by delivery as security.

§ 354. **War, political and social disturbances, pestilence, conflagration, floods, etc.** — Where a general disturbance of the public peace and quiet is sufficiently great to prevent parties from attending to their daily duties and affairs, it is generally held to excuse a failure of the holder to make presentment and protest, and to give notice of dishonor. Thus, the breaking out of war between the countries, in which the several parties reside, puts an end to all commercial intercourse between those parties. If, therefore, one party had to make presentment and protest to the other, and to give notice of dishonor, he is excused from doing so as

long as the war continues.[1] The same rule is followed, where a part of the country is occupied by the military forces of the enemy, and commercial intercourse between the two sections is thus interrupted. As long as the military occupation lasts, the holder will be excused from making the presentment or protest, or from sending the notice.[2] And so, also, when the government of one country interdicts all commerce and intercourse between its citizens and the citizens of another country, it has the effect of excusing the want of presentment, protest and notice.[3] The parties to commercial paper will also be excused from performing their duties, arising out of the paper, if they are prevented by a riot or insurrection. These and other public disturbances may be so great as to necessarily suspend all kinds of business, and in such cases the holder of maturing paper is excused from making presentment and giving notice of dishonor. But the disturbance must be sufficiently great to prevent the transaction of business.[4]

The same conclusion is also reached, where business is suspended on account of the prevalence of an epidemic of some contagious disease,[5] or some other unavoidable over-

[1] Scholefield *v.* Eichelberger, 7 Pet. 586; United States *v.* Grossmeyer, 9 Wall. 75; Alexander's Cotton, 2 Wall. 404; The William *v.* Bagaley, 5 Wall. 377; Patience *v.* Townsley, 2 J. P. Smith, 224; Berry *v.* Southern Bank, 2 Duv. 379; Bell *v.* Hall's Exrs., 2 Duv. 288; James *v.* Wade, 21 La. Ann. 548; Shaw *v.* Neal, 19 La. Ann. 156; Rynum *v.* Apperson, 9 Heisk. 632; Billgerry *v.* Branch, 19 Gratt. 393; Farmer's Bank *v.* Gunnell, 26 Gratt. 132; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 785; House *v.* Adams, 48 Pa. St. 261; Apperson *v.* Union Bank, 4 Cold. 445; Morgan *v.* Bank of Louisville, 4 Bush, 82; Norris *v.* Despard, 38 Md. 491; Durden *v.* Smith, 44 Miss. 548.

[2] Polk *v.* Spinks, 5 Cold. 431; Tardy *v.* Boyd, 26 Gratt. 632; Blair & Hage *v.* Wilson, 28 Gratt. 172.

[3] Story on Notes, §§ 257, 263; 1 Parsons' N. & B. 461; 2 Daniel's Negot. Inst., § 1063.

[4] Apperson *v.* Union Bank, 4 Cold. 446; Story on Notes, § 261; 2 Daniel's Negot. Inst., § 1065. See Blair & Hage *v.* Wilson, 28 Gratt. 172.

[5] 1 Parsons' N. & B. 460, 531; Story on Bills, § 308; Story on Notes, §

whelming public calamity, such as a flood or conflagration.[1] But the public calamity must be such as to absolutely prevent the transaction of business in order to operate as an excuse for the want of presentment, protest and notice.[2]

But whenever the impediment to the performance of these duties is removed, it is the duty of the holder to make presentment and protest, and to give out notices of dishonor, in order to hold the drawer and indorsers. And he has a reasonable time after the removal of the impediment in which to do these things.[3] What is a reasonable time is of course difficult to determine. In one case, several months after the removal were held to be an unreasonable delay.[4] In another case, five months delay was held to be unreasonable.[5] On the other hand, ten days delay was held to be reasonable.[6] It was said in Maryland, "There must be the earliest possible presentment when impediment ceased."[7]

§ 355. **Drawing without right to expect acceptance and payment.** — If one draws on another without having

260; Tunno *v.* Lague, 2 Johns. Cas. 1. See Roosevelt *v.* Woodhull, 2 Anth. (N. Y.) 50.

[1] Thompson on Bills, 280, 368; Story on Notes, § 258; Story on Bills, §§ 283, 286, 308, 327, 365; Chitty on Bills (13 Am. ed.), [*451] 509; Hilton *v.* Shepherd, 6 East, 16; Windham Bank *v.* Norton, 22 Conn. 213.

[2] Story on Bills, § 283; 2 Daniel's Negot. Inst., § 1069.

[3] House *v.* Adams, 48 Pa. St. 266; Shaw *v.* Neal, 19 La. Ann. 156; James *v.* Wade, 21 La. Ann. 548; Billgeny *v.* Branch, 19 Gratt. 393; Farmers' Bank *v.* Gannell, 26 Gratt. 132; Tarby *v.* Boyd, 26 Gratt. 631; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 785; Morgan *v.* Bank of Louisville, 4 Bush, 82; Dunbar *v.* Tyler, 44 Miss. 10; Durden *v.* Smith, 44 Miss. 552; Lane *v.* Bank of W. Tenn., 9 Heisk. 419; Apperson *v.* Union Bank, 4 Cold. 445; Peter *v.* Hobbs, 25 Ark. 67; Bynum *v.* Apperson, 9 Heisk. 632; Norris *v.* Despard, 38 Md. 491.

[4] Durden *v.* Smith, 44 Miss. 552. See Dunbar *v.* Tyler, 44 Miss. 10.

[5] Morgan *v.* Bank of Louisville, 4 Bush, 82.

[6] House *v.* Adams, 48 Pa. St. 266.

[7] Norris *v.* Despard, 38 Md. 491.

reasonable grounds to expect that the bill will be honored, the drawer cannot require presentment and notice of dishonor. Some of the cases are inclined to hold that in any case, the drawer may require presentment, although he cannot reasonably expect the bill to be honored, possibly on the ground that the unexpected always happens;[1] but the better and prevailing opinion is that in such a case both presentment and notice of dishonor are excused as to the drawer.[2] But such a fact would not excuse presentment and notice, as to indorsers, unless the indorsers have indorsed for the accommodation of the drawer, with knowledge of the fact that the drawer has no right to expect acceptance and payment. If the indorsers have such knowledge, they cannot require presentment and notice any more than can the drawer.[3] But if they know nothing of the relation between the drawer and drawee, they may in such cases require the presentment and notice, although the drawer cannot.[4] Where the drawer has supplied the drawee with collaterals to secure the payment of the amount of the bill he is entitled to presentment and notice.[5]

[1] Cruger *v.* Armstrong, 3 Johns. 5; English *v.* Wall, 12 Rob. (La.) 132.

[2] Terry *v.* Parker, 6 A. & E. 502; 1 Nev. & P. 752; Bond *v.* Farnham, 5 Mass. 171; Kinsley *v.* Robinson, 21 Pick. 327; Harker *v.* Anderson, 21 Wend. 372; Dollfus *v.* Frosch, 1 Denio, 367; Mobley *v.* Clark, 28 Barb. 390; Wood *v.* Gibbs, 35 Miss. 559. See Franklin *v.* Vanderpool, 1 Hall, 78; Adams *v.* Darby, 28 Mo. 162.

[3] French *v.* Bank of Columbia, 4 Cranch, 141; Foster *v.* Parker, 2 Law R. C. P. Div. 18; Farmers' Bank *v.* Vanmeter, 4 Rand. 553.

[4] Ralston *v.* Bullitts, 3 Bibb, 261; Bogy *v.* Keil, 1 Mo. 743; Jackson *v.* Richards, 3 Caines, 343; Wilkes *v.* Jacks, Peake, 202; French *v.* Bank of Columbia, 4 Cranch, 141; Scarborough *v.* Harris, 1 Bay, 177; Croton *v.* Dalheim, 6 Greenl. 476; Lisson *v.* Tomlinson, Selw. N. P. 335; Bamdullolday *v.* Darieux, 4 Wash. C. C. 61. And they are presumed to know nothing of such matters. Carter *v.* Flower, 16 M. & W. 743; Brown *v.* Maffy, 15 East, 216; Warder *v.* Tucker, 7 Mass. 449; Rea *v.* Dorrance, 18 Me. 137.

[5] Spooner *v.* Gardiner, Ry. & Mood. 84; Campbell *v.* Pettingill, 7 Greenl. 126; Ex parte Heath, 2 Ves. & B. 240.

If the drawer has funds in the hands of the drawee, he is conclusively presumed to have the right to expect his bill to be honored, although the drawee had notified the drawer to provide for its payment,[1] or not to draw on him;[2] and so, also, where the drawer is indebted to the drawee in a different transaction in a larger amount than in which the latter is his debtor,[3] or where the funds in the hands of the drawee have been attached or levied upon, after the bill had been drawn.[4] The drawer is also entitled to presentment and notice, where there is a running account between him and the drawee, although the balance may be somewhat less than the amount of the bill.[5] But while the insufficiency of the funds in the hands of the drawee may be very great without affecting the right to expect presentment and notice,[6] if the insufficiency becomes so great that the drawer could not reasonably expect the drawee to honor the bill, he is not entitled to presentment and notice.[7] But the want of funds will be no excuse for the failure to make due

[1] Prideaux *v.* Collier, 2 Stark. 57; Staples *v.* Okines, 1 Esp. 332; Clegg *v.* Cotton, 3 Bos. & P. 239.

[2] Cedar Falls Co. *v.* Wallace, 83 N. C. 229.

[3] Blackham *v.* Doren, 2 Camp. N. C. 503.

[4] Stanton *v.* Blossom, 14 Mass. 116.

[5] Thackray *v.* Blackett, 3 Camp. 164; Legge *v.* Thorpe, 12 East, 171; Chitty on Bills (13 Am. ed.), [*444]. The same rule would apply where, on account of a shrinkage in value, or of some other loss, the value of the property, in the hands of the drawee, against which the bill was drawn, was less than the amount of the bill. Robinson *v.* Ames, 20 Johns. 146; Rucker *v.* Hiller, 16 East, 53; Robins *v.* Gibson, 3 Camp. 384; Williams *v.* Brashear, 19 La. 370.

[6] In one case, the bill was for $2,777, and the balance was $883, La Coste *v.* Harper, 3 La. Ann. 385. See also Rutcliffe *v.* McDowell, 2 Nott & McC. 251; Wollenleber *v.* Ketterlinus, 17 Pa. St. 389.

[7] In one case, the amount of the bill was £246 3s. 7d., and the balance was 16s., held not entitled to notice, unless there were other circumstances in the case which would justify him in expecting the bill to be honored. Hopkirk *v.* Page, 2 Brock. C. C. 20, 34, Marshall, C. J. See also Blankenship *v.* Rogers, 10 Ind. 33; ——— *v.* Stanton, 1 Hayw. 271; Matter of Brown, 2 Story, 502, 520.

presentment and notice, if, notwithstanding such want of funds, the drawer had a right to expect the bill to be honored.[1]

The want of funds is also no excuse for the want of presentment and notice, where the drawer drew the bill for the accommodation of the acceptor or of the payee or subsequent indorsee.[2]

The acceptance of the bill certainly raises a strong presumption in favor of the right to expect the bill to be honored, and consequently of his right to expect presentment for payment and notice of non-payment.[3] But, although the presumption has been held to be conclusive,[4] the better rule seems to be that it may be shown by the proof of other facts that the drawer, notwithstanding the acceptance, could not reasonably expect the drawee to pay the bill.[5]

[1] As when he draws upon a consignment not yet come to hand, Dickens *v.* Beal, 10 Pet. 572; Grosvenor *v.* Stone, 8 Pick. 78; where the drawee has been in the habit of honoring the bills of the drawer for the latter's accommodation. Adams *v.* Darby, 28 Mo. 162; Dunbar *v.* Tyler, 44 Miss. 1; Dickens *v.* Beal, 10 Pet. 572; where he has expressly authorized the drawing of the bill, Walwyn *v.* St. Quintin, 1 Bos. & P. 652; Orear *v.* McDonald, 9 Gill, 350; Hopkirk *v.* Page, 2 Brock. 20; Dickens *v.* Beal, 10 Pet. 574: Oliver *v.* Bank of Tenn., 11 Humph. 74; or where a third party had promised to supply the funds. Dickens *v.* Beal, *supra;* French *v.* Bank of Columbia, 4 Cranch, 141; Lafitte *v.* Slatter, 6 Bing. 623; 4 Moore & P. 457. See also Miser *v.* Trovinger, 7 Ohio St. 281; Schuchardt *v.* Hall, 36 Md. 600; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; Golladay *v.* Bank of Union, 2 Head, 557; Welch *v.* B. C. Taylor Mfg. Co., 82 Ill. 581; McRea *v.* Rhodes, 22 Ark. 315; Louisiana St. Bank *v.* Buhler, 22 La. Ann. 83; Claridge *v.* Dalton, 4 Maule & S. 226; Oliver *v.* Bank of Tennessee, 11 Humph. 74.

[2] Ex parte Heath, 2 Ves. & B. 240; Corey *v.* Scott, 3 B. & Ald. 619; Norton *v.* Pickering, 8 B. & C. 610; Brown *v.* Maffey, 15 East, 216; Whitfield *v.* Savage, 2 Bos. & Pul. 277.

[3] Orear *v.* McDonald, 9 Gill, 350; Campbell *v.* Pettingill, 7 Greenl. 126; Hill *v.* Norris, 2 Stew. & P. 114.

[4] Pons *v.* Kelly, 2 Hayw. 45; Richie *v.* McCoy, 13 Sm. & M. 541.

[5] Kinsley *v.* Robinson, 21 Pick. 327; Hoffman *v.* Smith, 1 Caines, 157; Allen *v.* King, 4 McLean, 128; Mobley *v.* Clark, 28 Barb. 390.

This is particularly the case where the bill has been drawn for the mere accommodation of the drawer, and it is agreed between the parties that the drawer should provide funds for the payment of the bill. In such a case the drawer is not entitled to presentment and notice.[1] And the same is true, where the bill is payable at the drawer's own house or place of business.[2] The indorser is, also, not entitled to presentment and notice, if the paper is issued for his accommodation, and it is his duty to provide for payment.[3]

The same is also true, if the drawer or indorser has been provided by the acceptor or maker with the means of taking up the bill or note.[4] But if the bill is negotiated for the accommodation of the acceptor, presentment and notice are due to both the drawer and the drawee.[5]

Where the expectation of the honor of the bill rests upon the possession of funds by the drawee, in order that the drawer may claim the right to presentment and notice, it must be shown that the funds were in the hands of the drawee when the bill was drawn,[6] or that the drawer had reasonable grounds for expecting that the funds would be placed in the hands of the drawee before presentment.[7] If the drawer

[1] French *v.* Bank of Columbia, 4 Cranch, 141; Holman *v.* Whiting, 19 Ala. 703; Ross *v.* Bedell, 5 Duer, 462; Ex parte Heath, 2 Ves. & B. 240; Sharp *v.* Bailey, 9 B. & C. 44; Barbaroux *v.* Waters, 3 Met. 304; Torrey *v.* Foss, 40 Me. 74.

[2] Sharp *v.* Bailey, 9 B. & C. 44.

[3] Sharp *v.* Bailey, 9 B. & C. 44; French *v.* Bank of Columbia, 4 Cranch, 141; Turner *v.* Sampson, 2 Q. B. Div. 23 (19 Moak's E. R. 195); Keyes *v.* Winter, 54 Me. 400; McVeigh *v.* Bank of Old Dominion, 26 Gratt. 785.

[4] Ray *v.* Smith, 17 Wall. 418; Wright *v.* Andrews, 70 Me. 86; Bond *v.* Farnham, 5 Mass. 170; Cornay *v.* Da Costa, 1 Esp. 302; Watkins *v.* Cranch, 5 Leigh, 522; May *v.* Boisseau, 8 Leigh, 185, 196.

[5] French *v.* Bank of Columbia, 4 Cranch, 141, Marshall, C. J.

[6] French *v.* Bank of Columbia, 10 Pet. 572.

[7] Robins *v.* Gibson, 3 Camp. 334; Hammond *v.* Dufresne, 3 Camp. 145; Orear *v.* McDonald, 9 Gill, 350; Eichelberger *v.* Finley, 7 Har. & J. 381.

withdraws the funds before the presentment, or countermands the payment, he forfeits his right to presentment and notice,[1] unless he makes some other provision for the honor of the bill.[2]

§ 356. **What relations between the parties will excuse want of presentment and notice.** — Where the drawer and the drawee of a bill are the same person, there is no need for presentment or notice.[3] And so, also, where a partner draws on his firm, or the firm on a partner,[4] unless the firm has been dissolved, when notice would be necessary.[5] Where two firms, having one or more common members, draw on each other, notice of dishonor is not necessary,[6] although presentment is required.[7]

§ 357. **When note is void.** — It is very generally held that when a note is void as between the maker and payee, and the indorser knows it, the indorser is not entitled to demand and notice, for the reason that the indorser guarantees the obligation of the maker; and if he indorses a note which he knows to be void as to the maker, it would

[1] Dickens *v.* Beal, 10 Pet. 572; Rhett *v.* Poe, 2 How. 457; Rucker *v.* Hiller, 3 Camp. 217; Sutcliffe *v.* McDonald, 2 Nott & McC. 251; Conroy *v.* Warren, 3 Johns. 259; Murray *v.* Judah, 6 Cow. 484; Valk *v.* Simmons, 4 Mason, 113.

[2] Orr *v.* McGinness, 7 East, 359.

[3] Maux Ferry Co. *v.* Branegan, 40 Ind. 361; Fairchild *v.* Ogdensburg R. R. Co., 15 N. Y. 357; Bailey *v.* Southwestern Bank, 11 Fla. 266. But see 2 Ames' N. & B. 462.

[4] Rhett *v.* Poe, 2 How. 457; New York, etc., Co. *v.* Meyer, 51 Ala. 325; Porthouse *v.* Parker, 1 Camp. 82; Fuller *v.* Hooper, 3 Gray, 334; Taylor *v.* Young, 3 Watts, 339; Gowan *v.* Jackson, 20 Johns. 176.

[5] Taylor *v.* Young, 3 Watts, 339.

[6] New York, etc., Co. *v.* Selma Sav. Bank, 51 Ala. 305; West Branch Bank *v.* Fulmer, 3 Pa. St. 399. See Porthouse *v.* Parker, 1 Camp. 82. See also *contra*, 1 Parsons' N. & B. 523.

[7] Dwight *v.* Scovil, 2 Conn. 654; Foland *v.* Boyd, 23 Pa. St. 476; Caunt *v.* Thompson, 7 Man. G. & S., 400; 1 Parsons' N. & B. 523.

be a fraud upon the indorsee to require him to make presentment or to give notice.[1] But it has been held that the indorser must know of the illegality of the note, in order to dispense with presentment and notice.[2] It has, however, been held that it is not necessary for the indorser to have knowledge of the illegality of the note, in order to excuse want of presentment and notice, at least, in order to enable the indorsee to recover of him the consideration paid.[3] But the accommodation indorser is always entitled to presentment and notice, if he does not know of the invalidity of the note.[4]

§ 358. **Inability to discover the address of parties.** — The want of due presentment or due notice, will be excused by the fact that the holder cannot find out the address of the party to whom presentment is to be made, or notice given. If due diligence has been exercised in the endeavor to ascertain the address, the holder will be excused, and can hold the parties secondarily liable without presentment or notice.[5] But the inability to find the maker or acceptor will only excuse the want of presentment. Notice of dishonor should at all events be sent to the drawer and indorsers, unless they cannot be found.[6]

[1] Copp *v.* M'Dugall, 9 Mass. 1; Turnbull *v.* Bowyer, 40 N. Y. 456; Cundy *v.* Marriott, 1 B. & Ad. 696; Burrill *v.* Smith, 7 Pick. 291; Farmers' Bank *v.* Vanmeter, 4 Rand. 553; 1 Parsons' N. & B. 445, 460; Perkins *v.* White, 36 Ohio St. 530; Wilson *v.* Vysar, 4 Taunt, 218; Morrison *v.* Lovell, 4 W. Va. 346; Bissell *v.* Bozman, 2 Dev. Eq. 154; Butler *v.* Slocomb, 33 La. Ann. 170.

[2] Wyman *v.* Adams, 12 Cush. 210; Leach *v.* Hewitt, 4 Taunt. 731; 1 Parsons' N. & B. 444, note. See Carter *v.* Flower, 16 M. & W. 747; Farmers' Bank *v.* Vanmeter, 4 Rand. 561.

[3] 1 Parsons' N. & B. 560; 2 Daniel's Negot. Inst., § 1113a.

[4] Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207.

[5] Garvier *v.* Downie, 33 Cal. 176; Bateman *v.* Joseph, 2 Camp. 463; 12 East, 433.

[6] 1 Parsons' N. & B. 527; 2 Daniel's Negot. Inst., § 1120; May *v.* Coffin, 4 Mass. 341.

But this inability only furnishes an excuse for the want of presentment and notice, as long as it continues; and the holder is obliged to make presentment or to give notice, as soon as he finds the parties.[1] Where the maker or acceptor has permanently left his domicile; and established another in the same State or country, presentment should be made as soon as the new domicile is discovered.[2] But if the new domicile is acquired in a different State or country, the holder is not required to go out of the State to make presentment in the new domicile; but he satisfies the law by making a demand at the payor's last place of residence or business.[3] And for these purposes, the States of the American Union are considered as foreign to each other.[4]

Where the payor has absconded, and particularly when he is notoriously insolvent, it is not necessary to make presentment anywhere, not even at the old place of business or residence.[5] Where the drawer, or indorser has himself

[1] Browning *v.* Kinnear, Gow. 81; Bateman *v.* Joseph, 2 Camp. 461; Baldwin *v.* Richardson, 1 B. & C. 245; Firth *v.* Thrush, 8 B. & C. 387; Sturgis *v.* Derrick, Wight, 76. But see *ante*, §§ 314, 340, for a discussion of the duty of the holder, when the place of business or residence of the party is temporarily closed.

[2] Louisiana Ins. Co. *v.* Shamburgh, 7 Mart. (N. S.) 260; Anderson *v.* Drake, 14 Johns. 114.

[3] McGruder *v.* Bank of Washington, 9 Wheat. 598; Adams *v.* Leland, 30 N. Y. 309; Foster *v.* Julien, 24 N. Y. 28; Dennie *v.* Walker, 7 N. H. 199; Reid *v.* Morrison, 2 Watts & S. 401; Wheeler *v.* Field, 6 Met. 290; Grafton Bank *v.* Cox, 13 Gray, 503; Gillespie *v.* Hannahan, 4 McCord, 503; Herrick *v.* Baldwin, 17 Minn. 209; Cromwell *v.* Hynson, 2 Esp. 211; Taylor *v.* Snyder, 3 Den. 145; Anderson *v.* Drake, 14 Johns. 114; Gist *v.* Lybrand, 3 Ohio, 308; Central Bank *v.* Allen, 16 Me. 41; Whittier *v.* Graham, 3 Greenl. 32.

[4] McGruder *v.* Bank of Washington, 9 Wheat. 598; Gillespie *v.* Hanahan, 4 McCord, 503; Widgery *v.* Monroe, 6 Mass. 449. But see *contra* Barker *v.* Clark, 20 Me. 156; Phipps *v.* Chase, 6 Met. 491.

[5] Anon., Ld. Raym, 743; Lehman *v.* Jones, 1 Watts & S. 126; Wolfe *v.* Jewett, 10 La. Ann. 383; Duncan *v.* McCullough, 4 Serg. & R. 480; Ratcliffe *v.* Planters' Bank, 2 Sneed, 425, 455; Taylor *v.* Snyder, 3 Den. 145;

absconded, the notice should be left at his last place of residence, or with his representative or attorney.[1] And where the payor has only absconded to some place within the same State, presentment is only excused, as long as his new place of abode cannot be found.[2]

§ 359. **What is due diligence in making inquiries after parties.** —In making inquiries after the address of the parties to commercial paper, ordinary diligence is required; that degree of diligence which may be expected of a reasonably prudent man under the circumstances. And if, after the exercise of reasonable diligence, the party cannot be found, or a wrong address has been obtained, to which the notice has been sent, or at which the paper was presented for payment, the holder is excused from further presentment and notice.[3] Whenever the holder in his inquiries reaches a reliable person who professes to know of the residence or place of business of the party, it is not necessary for the holder to make further inquiries, although the information proves to be erroneous.[4] But until some such definite information is received, inquiry must be made first, of every other party to the paper,[5] and finally, of every one else who

Gillespie *v.* Hanahan, 4 McCord, 503; Bruce *v.* Rytle, 13 Barb. 163; Hale *v.* Burr, 12 Mass. 89; Shaw *v.* Reed, 12 Pick. 132; Putnam *v.* Sullivan, 4 Mass. 45. *Contra* Pierce *v.* Cate, 12 Cush. 190; Grafton Bank *v.* Cox, 13 Gray, 504.

[1] Ex parte Rohde, Mont. & M. 430; 1 Parsons' N. & B. 528.

[2] Reid *v.* Morrison, 2 Watts & S. 401; Duncan *v.* McCullough, 4 Serg. & R. 480; Redfield & Bigelow's Cases, 339.

[3] Harris *v.* Robinson, 4 How. 336; Cent. Nat. Bank *v.* Adams, 11 S. C. 452; Gawtry *v.* Doane, 51 N. Y. 92; Williams *v.* Bank of United States, 2 Pet. 100.

[4] Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Bank of Utica *v.* Bender, 21 Wend. 643; Spencer *v.* Bank of Saliua, 3 Hill, 520; Williams *v.* Bank of United States, 2 Pet. 100; Harris *v.* Robinson, 4 How. 336; Gawtry *v.* Doane, 51 N. Y. 92; Central Nat. Bank *v.* Adams, 11 S. C. 452.

[5] Wheeler *v.* Field, 6 Met. 290; Porter *v.* Judson, 1 Gray, 175; Grafton Bank *v.* Cox, 13 Gray, 505; Hill *v.* Varnell, 2 Greenl. 233; Gilchrist *v.*

is likely to know, and whose statements in reference to the matter are more or less reliable.[1] But if every source of information has been resorted to without avail, then the holder is excused from making presentment or giving notice, as, for example, where the party is a sailor, and has no regular place of abode on land.[2]

§ 360. **Sickness and death of, or accident to, the holder.** — The sickness and death of the holder, as well as some sudden accident or injury to him, happening on the eve of the paper maturing, so unexpectedly that provision could not be made for the presentment and demand, have been held to be sufficient excuses for the failure to present or to give notice, provided these things are done as soon thereafter as is possible.[3] And the same rule has been followed, where an agent, to whom the paper has been sent for collection, fails to present and to give notice on the

Donnell, 53 Me. 591; Weakly *v.* Bell, 9 Watts, 273; Waters *v.* Brown, 15 Md. 285; Whitridge *v.* Rider, 22 Md. 558; Earnest *v.* Taylor, 25 Tex. (Supp.) 37; Harrison *v.* Robinson, 4 How. 336. And it is the duty of the notary to make inquiry of the holder, for he is presumed to know, at least, of the residence of the immediate indorser. Titler *v.* Morris, 6 Whart. 406; Haly *v.* Brown, 5 Pa. St. 178; Smith *v.* Fisher, 24 Pa. St. 222; Lawrence *v.* Miller, 16 N. Y. 235.

[1] Lambert *v.* Ghiselin, 9 How. 452; Chapman *v.* Lipscombe, 1 Johns. 294; Ransom *v.* Mack, 2 Hill, 587; Harris *v.* Robinson, 4 How. 336; Bank of Utica *v.* Bender, 21 Wend. 643; Central Nat. Bank *v.* Adams, 11 S. C. 452; Greenwich Bank *v.* DeGroat, 14 N. Y. S. C. 213 (7 Hun); Baer *v.* Leppert, 19 N. Y. S. C. 516 (12 Hun); Brighton Market Bank *v.* Philbrick, 40 N. H. 506; Spencer *v.* Bank of Salina, 3 Hill, 520. See Peet *v.* Zanders, 6 La. Ann. 364.

[2] Moore *v.* Coffield, 1 Dev. 247; Taylor *v.* Snyder, 2 Den. 145; Dennie, *v.* Walker, 7 N. H. 199; Whittier *v.* Graffam, 3 Greenl. 82.

[3] Duggan *v.* King, Rice, 239; Aymar *v.* Beers, 7 Cow. 705; White *v.* Stoddard, 11 Gray, 258; Hilton *v.* Shepherd, 6 East, 16; Chitty on Bills (13th Am. ed.), [*330, 451, 491] 370, 509, 556; Story on Bills, § 308; 1 Parsons' N. & B. 267; Thompson on Bills, 280, 368; as to the appointment of personal representatives, see *ante*, § 146.

day of maturity, on account of his sudden illness or accident.[1]

§ 361. **Delay in receipt of the paper.** — If the paper is sent to an agent for collection, or transferred for consideration, so near to the day of maturity, that it is impossible to present for payment on the day of maturity, the presentment and notice will be excused, at least as to the indorser who had caused the delay.[2] But it will be no excuse as to the prior indorsers, who had not necessitated the delay.[3]

§ 362. **When party has received security for his secondary liability.** — The effect of the drawer or indorser receiving collateral security, from the acceptor or maker, upon his right to require presentment and notice is very doubtful in the light of the authorities. Some of the authorities maintain that if the indorser or drawer should receive an assignment of all the property of the maker or acceptor, he could not require presentment and notice, since there is nothing left in the hands of the primary obligor, out of which to expect payment.[4] Other authorities hold that presentment and notice are waived, whenever the secondary obligor has collateral security sufficient to satisfy the debt, whether it constitutes all, or only a part of, the property of the primary obligor, on the ground that

[1] Pothier De Change, n. 144; Story on Bills, § 309; Chitty on Bills, 509, note *a*.

[2] 1 Parsons' N. & B. 456; Story on Notes, §§ 203, 265; 2 Daniel's Negot. Inst., § 1124.

[3] Mason *v.* Pritchard, 9 Heisk. 798; Story on Notes, § 265; Thompson on Bills, 297. But see Chitty on Bills [*389], 440.

[4] Duvall *v.* Farmers' Bank, 9 Gill & J. 31; Watkins *v.* Crouch, 5 Leigh, 522; May *v.* Boisseau, 8 Leigh, 213; Kramer *v.* Sandford, 4 Watts & S. 328; Bank of So. Ca. *v.* Meyers, 1 Bailey, 412; Swan *v.* Hodge, 3 Head, 251; 1 Parsons' N. & B. 560, but see p. 571. In Watkins *v.* Crouch, *supra*, it is held that it is not necessary for the property to be sufficient to satisfy the entire debt, in order to have this effect.

in such a case, the primary obligor could not possibly suffer any damage from the want of presentment and notice.[1] And Judge Story goes so far as to hold that where the security is only partial, it will be a waiver *pro tanto* of presentment and notice.[2] But the cases do not support him in this extreme view, all the cases requiring, as a condition precedent to the waiver of presentment and notice, that the security shall either be sufficient to cover the liability, or constitute the entire property of the primary obligor.[3] An attempt is made to distinguish between demand and notice, and to hold that an insufficient security would excuse notice but not presentment.[4] But the distinction is unsound and does not meet with approval.[5] But the better opinion is that, in order that the possession of collateral security by an indorser or drawer will relieve the holder from the duty of presentment and notice, the indorser must with the reception of the security obligate himself to see to the payment of the paper; otherwise he might reasonably presume from the silence of the holder that the paper has been paid, and thus be induced to part with the security. But if he has undertaken to make payment, he cannot expect the

[1] Marshall *v.* Mitchell, 35 Me. 221; Durham *v.* Price, 5 Yerg. 300; Kyle *v.* Green, 14 Ohio, 495; Develing *v.* Ferris, 18 Ohio, 170; Beard *v.* Westerman, 32 Ohio St. 29; Smith *v.* Lonsdale, 6 Ore. 157; Stephenson *v.* Primrose, 8 Port. (Ala.) 155; Barnett *v.* Charleston Bank, 2 McMullan, 191; Walker *v.* Walker, 2 Eng. (Ark.) 542; 3 Kent's Com. 113.

[2] Story on Notes, § 357.

[3] Burrows *v* Hanegan, 1 McLean, 309; Second Nat. Bank *v.* McGuire, 33 Ohio St. 295; Kyle *v.* Green, 14 Ohio, 495; Wilson *v.* Senier, 14 Wis. 380; Woodman *v.* Eastman, 10 N. H. 359; Spencer *v.* Harvey, 17 Wend. 489; 1 Parsons' N. & B. 569, 570; Watkins *v.* Crouch, 5 Leigh, 522; Brunson *v.* Napier, 1 Yerg. 199; Holman *v.* Whiting, 19 Ala. 708. In Brandt Mickle, 28 Md. 436, it was held that a transfer of a part of the maker's property to the indorser of the note, did not excuse presentment and notice, even though it constituted all the property the maker had when the note fell due.

[4] Watkins *v.* Crouch, 5 Leigh, 522.

[5] Denny *v.* Palmer, 5 Ired. 610.

maker or acceptor to make the payment.[1] Some of the cases recognize this ruling so far as to hold that the reception of sufficient security, or the assignment of the entire estate of the acceptor or maker, implies the promise of the drawer or indorser to see to the payment of the bill or note.[2] The taking of security may be accompanied by circumstances, which would make the obligation to see to the payment a necessary implication, as where the property was given direct to the indorser and he was directed to sell the security and convert it into money,[3] or where the securities are readily convertible into money.[4] So, also, where there has been a confession of judgment.[5] But without these special circumstances, the receipt of security raises no presumption of a promise to make payment. And it has been held to be no excuse for the want of presentment and notice, that the indorser had funds of the maker or acceptor, which he was authorized to apply to the payment, but which he had not received for that avowed purpose, nor promised to apply to that purpose.[6]

Where the funds or securities are received to meet a particular indorsement or indorsements, they will not constitute an excuse for the want of presentment and notice as to any other indorsements.[7]

[1] Bond *v.* Farnham, 5 Mass. 170; Seacord *v.* Miller, 3 Ker. 55; Taylor *v.* French, 4 E. D. Smith, 458; Creamer *v.* Perry, 17 Pick. 382; Haskell *v.* Boardman, 8 Allen, 39; Holland *v.* Turner, 10 Conn. 308; Moses *v.* Ela, 43 N. H. 560; Mechanics' Bank *v.* Griswold, 7 Wend. 165; Woodman *v.* Eastman, 10 N. H. 367.

[2] Watkins *v.* Crouch, 5 Leigh, 522; Spencer *v.* Harvey, 17 Wend. 489; Barton *v.* Baker, 1 Serg. & R. 334; Kramer *v.* Sandford, 4 Watts & S. 328.

[3] Story on Notes, § 282; Denny *v.* Palmer, 5 Ired. 610; May *v.* Boisseau, 8 Leigh, 195.

[4] Dufour *v.* Morse, 9 La. 333; Kramer *v.* Sandford, 4 Watts & S. 328.

[5] Richter *v.* Selin, 8 S. & R. 425.

[6] Ray *v.* Smith, 17 Wall. 416.

[7] Prentiss *v.* Danielson, 5 Conn. 175; Bond *v.* Farnham, 5 Mass. 170.

§ 363. **Waiver of presentment and notice.** — Since the requirement of the presentment and notice is for the benefit of the parties, they may agree among themselves to waive them. The waiver may be couched in some express agreement, or it may be inferred from some collateral agreement, or understanding.[1] For example, if any party, in indorsing or otherwise signing a commercial instrument, should make use of language which imposes upon him the liability of a guarantor, it will impliedly waive presentment and notice, since they are not required in the case of a guaranty. This construction has been placed upon the words "accountable," "eventually accountable," [2] "holden," [3] "hold ourselves responsible for payment," [4] and the like.[5] Whether particular language amounts to a waiver or not has been held by the Supreme Court of the United States to be a question of fact.[6] But the Supreme Court of Massachusetts holds that it becomes a question of law, as soon as the terms used acquire by long usage a settled meaning in the law merchant.[7]

[1] Fuller *v.* McDonald, 8 Greenl. 213; Bird *v.* Le Blanc, 6 La. Ann. 470; Wall *v.* Bry, 1 La. Ann. 312; Gregory *v.* Allen, Mart. & Y. 74; 1 Parsons' N. & B. 594.

[2] McDonald *v.* Bailey, 14 Me. 101; Burnham *v.* Webster, 17 Me. 50; Turber *v.* Caverly, 42 N. H. 74.

[3] Bean *v.* Arnold, 16 Me. 251; Blanchard *v.* Wood, 26 Me. 358.

[4] Blanc *v.* Mutual Nat. Bank, 28 La. 922. See Small *v.* Clarke, 51 Cal. 227.

[5] In Airey *v.* Pearson, 37 Mo. 424, the language was as follows: "I assign the within note to J. T., and hold myself responsible for the payment of the same, the maker to have two years to pay the same, unless he prefers to pay sooner —— interest on the same to be paid annually."

[6] Union Bank *v.* Magruder, 7 Pet. 287. See Carmichael *v.* Bank of Pennsylvania, 4 How. (Miss.) 567.

[7] Creamer *v.* Perry, 17 Pick. 332, Shaw, Ch. J.: "Though questions of due diligence and waiver were originally questions of fact, yet having been reduced to a good degree of certainty by mercantile usage, and a long course of judicial decision, they assume the character of questions

If the waiver is put in the body of the instrument, it enters into, and forms a part of the contract of every one who signs his name to the paper, whether as drawer or indorser.[1] If the waiver is made by one of the indorsers in writing over his signature, it constitutes simply the personal waiver of that indorser, and is not binding upon the other indorsers, who do not become a party to the waiver.[2] At least that is the opinion of the majority, although the contrary opinion is sustained by the Supreme Court of Maine.[3]

The waiver may be written on a separate paper, and executed before or after the indorsement.[4] Whether a verbal waiver will bind the party making it, is doubtful, the question having been answered both in the affirmative[5] and in the negative;[6] and where only the waiver of demand

of law; and it is highly important that they should be so deemed and applied, in order that rules affecting so extensive and important a department in the transactions of a mercantile community may be certain, practical and uniform, as well as reasonable, equitable and intelligible."

[1] Bryant *v.* Merchants' Bank, 8 Bush, 43; Smith *v.* Lockridge, 8 Bush, 423; Farmers' Bank *v.* Ewing, 78 Ky. 266; Lowry *v.* Steele, 27 Ind. 170. This is particularly true when the waiver expressly includes the indorsers. Bryant *v.* Lord, 19 Minn. 397.

[2] Woodman *v.* Thurston, 8 Cush. 157; Central Bank *v.* Davis, 19 Pick. 373; Farmers' Bank *v.* Ewing, 78 Ky. 266; May *v.* Boisseau, 8 Leigh, 164; Duffy *v.* O'Connor, 7 Baxt. 498; Halley *v.* Jackson, 48 Md. 254.

[3] Parshley *v.* Heath, 69 Me. 90.

[4] Duvall *v.* Farmers' Bank, 7 Gill & J. 44; Spencer *v.* Harvey, 17 Wend. 489.

[5] Dye *v.* Scott, 35 Ohio St. 194; Boyd *v.* Cleveland, 4 Pick. 525; Hazard *v.* White, 26 Ark. 174; Fuller *v.* McDonald, 8 Greenl. 213; Lane *v.* Steward, 20 Me. 98; Taylor *v.* French, 2 Lea, 260; Barclay *v.* Weaver, 19 Pa. St. 396.

[6] Beeler *v.* Frost, 70 Mo. 186; Rodney *v.* Wilson, 67 Mo. 123, Hough, J.: "We think the policy of the law requires that the paper 'tell its own story.'" In Maine, required by statute, to be in writing. Thomas *v.* Mayo, 56 Me. 40. See 2 Ames' B. & N. 133; Barry *v.* Morse, 3 N. H. 132; Hightower *v.* Ivy, 2 Port. (Ala.) 308; Kern *v.* Van Phul, 7 Minn. 74.

is written, parol evidence is admissible to show a verbal waiver of notice.[1]

The waiver may be made by any party, secondarily liable on the paper, or by his duly authorized agent.[2] And where the paper has been drawn or indorsed by a firm, any one partner may waive presentment and notice, even after the dissolution of the firm,[3] unless the waiver occurs after maturity, in which case the firm has been already discharged, and the waiver would constitute a new promise to pay; and this a partner could not do, so as to bind the firm, after dissolution.[4] It has also been held impossible for a partner in any case, after dissolution, to bind a dormant partner by his waiver of demand and notice.[5]

The waiver must be made to the holder of the paper. It will have no effect, if made to a stranger.[6] But if made to the holder, it will inure to the benefit of every other person to whom the paper is subsequently transferred.[7]

But a waiver will not be construed to extend beyond

[1] Drinkwater *v.* Tebbets, 16 Me. 17; Mills *v.* Beard, 19 Cal. 161; Edwards on Bills, 635.

[2] Standage *v.* Creighton, 5 Car. & P. 406.

[3] Darling *v.* March, 22 Me. 184; Star Wagon Co. *v.* Sweezey, 52 Iowa, 394.

[4] Hart *v.* Long, 1 Rob. (La.) 83.

[5] Manney *v.* Coit, 80 N. C. 300.

[6] Miller *v.* Hackley, 5 Johns. 375; National Bank *v.* Lewis, 50 Vt. 622 (28 Am. Rep. 514, 517); Devendorf *v.* West Va., etc., L. Co., 17 W. Va. 175; Olendorf *v.* Swartz, 5 Cal. 580. But a promise to pay made to a stranger is held to be evidence that there had been due presentment and notice. Potter *v.* Rayworth, 13 East, 417, Lord Ellenborough saying: "Whether the promise to pay was made to the plaintiff, or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of its dishonor."

[7] Kennon *v.* McRea, 7 Port. (Ala.) 175; Potter *v.* Rayworth, 13 East, 417; Gunson *v.* Metz, 1 B. & C. 193; 2 Dow. & R. 334; Rogers *v.* Hackett, 21 N. H. 100. See Marshall *v.* Mitchell, 35 Me. 221; Williams *v.* Brobst, 10 Watts, 111; Devendorf *v.* West Va. L. Co., 17 W. Va. 175; Curtiss *v.* Martin, 20 Ill. 557; 1 Parsons' N. & B. 611.

the fair and plain intent of the party. Thus, a waiver of notice, simply, will not include by implication a waiver of demand.[1] But it would seem that the waiver of demand would include a waiver of notice, since there can be no notice of dishonor, if there be no demand; although, of course, there may, without demand, be a notice of the fact of non-payment.[2] A waiver of protest and notice, in the case of foreign bills, is held to include a waiver of demand,[3] and even the waiver of protest alone has been held to include a waiver of demand and notice.[4] And so, also, will the waiver of protest be included in a waiver of demand and notice.[5] Inasmuch as the word "protest" has come by mercantile usage to mean more than the official declaration of the notary, it has been generally held that the waiver of protest in the case of inland bills and notes will have the effect of including a waiver of demand and notice, although the technical protest is not required to fix the liability of parties to inland paper.[6] But inasmuch as

[1] Drinkwater *v.* Tebbetts, 17 Me. 16; Lane *v.* Steward, 20 Me. 98; Berkshire Bank *v.* Jones, 6 Mass. 524; Scull *v.* Mason, 7 Wright, 99; Phipson *v.* Kneller, 1 Stark. 116; 4 Camp 285; Backus *v.* Shipherd, 11 Wend. 16; Voorhees *v.* Atlee, 29 Iowa, 49; Buchanan *v.* Marshall, 22 Vt. 561; Burnham *v.* Webster, 17 Me. 50; Sprague *v.* Fletcher, 8 Ore. 367. *Contra*, Matthey *v.* Gally, 4 Cal. 62.

[2] Bryant *v.* Merchants' Bank, 8 Bush, 43; Porter *v.* Kemble, 53 Barb. 867. See Blanc *v.* Mutual Nat. Bank, 28 La. Ann. 921; Forster *v.* Jusdison, 16 East, 105; Ridgeway *v.* Day, 13 Pa. St. 288.

[3] Bryant *v.* Merchants' Bank, 8 Bush, 43; Baker *v.* Scott, 29 Kan. 136; Gordon *v.* Montgomery, 19 Ind. 110.

[4] Union Bank *v.* Hyde, 6 Wheat. 572; City Sav. Bank *v.* Hopson, 53 Conn. 453; Brown *v.* Hull, 33 Gratt. 31; Annville Nat. Bank *v.* Kettering, 106 Pa. St. 531; First Nat. Bank *v.* Hartman,— Pa. St. (1885) —; Williams *v.* Lewis, 69 Ga. 762; Harrington *v.* Dorr, 3 Robt. 275; Carmena *v.* Mix, 15 La. 165.

[5] Woodman *v.* Thurston, 8 Cush. 157; Nat. Exch. Bank *v.* Kimball, 66 Ga. 753; Jaccard *v.* Anderson, 37 Mo. 91; Johnston *v.* Searcy, 4 Yerg. 182.

[6] Coddington *v.* Davis, 1 Comst. 186; 3 Denio, 16; Porter *v.* Kemball, 53 Barb. 467; Hood *v.* Hallerbeck, 14 N. Y. S. C. (8 Hun) 364; Jaccard *v.* Anderson, 37 Mo. 91; Fisher *v.* Price, 37 Ala. 407; Carpenter *v.* Reynolds,

the technical meaning of protest does not include demand, and in the case of inland paper, protest is not required, the position assumed by the Supreme Court of the United States is sounder on principle, viz.: that the scope of the waiver is ambiguous, and parol evidence is admissible to show in what sense the word *protest* is used.[1]

The effect of the waiver will not be altered by the assignment of unsatisfactory reasons for the same.[2]

§ 364. **Waivers made after execution, and before maturity of the paper.** — Waivers may be made after the execution of the paper, or after its indorsement, and it will have the same effect, as if made before the negotiation of the paper. Where it is done before maturity, any act or language, which is calculated, when addressed by the drawer or indorser to the holder, to induce the holder to dispense with demand and notice, will have the effect of a waiver.[3] Such would be any announcement of the uselessness of making presentment,[4] requests for extension of the time of payment by, or with the consent of, the drawer or indorser,[5] and distinct promises to pay or assurances of

42 Miss. 807. *Contra*, Ball *v.* Greand, 14 La. Ann. 305; Wall *v.* Bry, 1 La. Ann. 312; Bird *v.* La Blanc, 6 La. Ann. 470, *overruled* by Harvey *v.* Nelson, 31 La. Ann. 434. (See Brown *v.* Hull, 33 Gratt. 31; Sprague *v.* Fletcher, 8 Ore. 367.)

[1] Union Bank *v.* Hyde, 6 Wheat. 572.

[2] Neal *v.* Wood, 23 Ind. 524, in which the waiver read: "Notice, demand, protest and due diligence waived on account of the war and insurrection."

[3] See Boyd *v.* Bank of Toledo, 32 Ohio St. 526; Moyer's Appeal, 87 Pa. St. 129.

[4] Minturn *v.* Fisher, 7 Cal. 573; Hunter *v.* Hook, 64 Barb. 468; Taylor *v.* French, 4 E. D. Smith, 458.

[5] Ridgeway *v.* Day, 13 Pa. St. 208; Barclay *v.* Weaver, 19 Pa. St. 396; Amoskeag Bank *v.* Moore, 37 N. H. 539; Farmers' Bank *v.* Wakles, 4 Harr. (Del.) 429; Spencer *v.* Harvey, 17 Wend. 489; Hale *v.* Danforth, 46 Wis. 555; Leffingwell *v.* White, 1 Johns. Cas. 99; Gove *v.* Vining, 7 Metc. 212; Sheldon *v.* Chapman, 31 N. Y. 644; Sheldon *v.* Horton, 53 Barb. 23.

payment at maturity.[1] To the same effect, is the imposition of any obstacle in the way of payment, as where one stops the payment of his check or bill,[2] or where the indorser prevents its presentment at maturity by retaining possession of the bill, until after maturity.[3] Mere attempts by an indorser to get the primary obligor to pay the bill or note, will not constitute a waiver,[4] unless the indorser undertook to present the paper after maturity.[5]

Not only will such acts and language constitute a waiver when made use of before maturity, but also when they occurred on the very day of maturity.[6]

§ 365. **Waivers after maturity.** — The want of presentment is also waived where the drawer or indorser, after maturity and with knowledge of the failure to make due demand and protest and to give notice, promises to pay the bill,[7] or makes part payment of the same, under circum-

[1] Taunton Bank *v.* Richardson, 5 Pick. 436; Whitney *v.* Abbott, 5 N. H. 378; Bryan *v.* Wilcox, 49 Cal. 47; Marshall *v.* Mitchell, 35 Me. 221; Leonard *v.* Gary, 10 Wend. 504; Bruce *v.* Lytle, 13 Barb. 163; Lary *v.* Young, 8 Eng. (Ark.) 401; Boyd *v.* Bank of Toledo, 32 Ohio St. 526; Backers *v.* Shepherd, 11 Wend. 629; Sigerson *v.* Mathews, 20 How. 496.

[2] Purchase *v.* Mattison, 6 Duer, 587; Jacks *v.* Darrin, 3 E. D. Smith, 557; Lilley *v.* Miller, 2 Nott & McCord, 257. But see Hill *v.* Heap, Dow. & R. N. P. 57, where it is held that this would only dispense with notice.

[3] Havens *v.* Talbott, 11 Ind. 323.

[4] Cram *v.* Sherburne, 14 Me. 48.

[5] Hussey *v.* Freeman, 10 Mass. 84.

[6] Scott *v.* Greer, 10 Pa. St. 103, request not to protest; Barker *v.* Barker, 6 Pick. 80, statement that it was useless to demand; Moyer's Appeal, 87 Pa. St. 129, request for indulgence; Burgh *v.* Legge, 5 M. & W. 418; Yeager *v.* Farwell, 13 Wall. 12, promises to pay; Boyd *v.* Bank of Toledo, 32 Ohio St. 526; Blanc *v.* Mutual Bank, 28 La. Ann. 921, no demand or notice is required at the expiration of the extended time; Leary *v.* Miller, 61 N. Y. 489, an excepted renewal, overruling Cayuga Co. Bank *v.* Dill, 5 Hill, 404.

[7] Sigerson *v.* Mathews, 20 How. 496; Reynolds *v.* Douglass, 12 Pet. 497; Thornton *v.* Wynn, 12 Wheat. 183; Yeager *v.* Falwell, 13 Wall. 12;

stances that lead one to presume a promise to pay the balance.[1] But the position thus taken is not without objection; and it has been held that promises to pay, made after maturity, cannot be considered as waivers of protest and notice, for the reason that, being made after the original liability has been extinguished by the failure to make presentment and to give notice, the promises are not binding unless supported by some fresh consideration.[2] If the promise to pay, or part payment, has been made in ignorance of the default in making presentment and giving notice, it will not have the effect of a waiver.[3] And in the case of part-payment, under these

Gove *v.* Vining, 7 Met. 212; Armstrong *v.* Chadwick, 127 Mass. 156; Salisbury *v.* Renick, 44 Mo. 554; Martin *v.* Winslow, 2 Mason, 241; Hazard *v.* White, 26 Ark. 280, Walker *v.* Rogers, 39 Ill. 279; Smith *v.* Curlee, 59 Ill. 221; Carter *v.* Sprague, 51 Cal. 239; Ross *v.* Hurd, 71 N. Y. 14; Duryee *v.* Dennison, 5 Johns. 248; Fell *v.* Dial, 14 S. C. 247; Moyer's Appeal, 87 Pa. St. 129; Hughes *v.* Bowen, 15 Iowa, 446; Spurlock *v.* Union Bank, 4 Humph. 336; James *v.* Wade, 21 La. Ann. 548; Mathews *v.* Allen, 16 Gray, 594; Tardy *v.* Boyd, 26 Gratt. 637; Givens *v.* Merchants' Nat. Bank, 85 Ill. 444; Trimble *v.* Thorn, 16 Johns. 152; Smith *v.* Lounsdale, 6 Ore. 80.

[1] Vaughn *v.* Fuller, 2 Stra. 1246; Holford *v.* Wilson, 1 Taunt. 12; Whitaker *v.* Morris, 1 Fla. 25; Sherer *v.* Easton Bank, 33 Pa. St. 134; Harvey *v.* Troup, 23 Miss. 538; Williams *v.* Robinson, 13 La. 419; Newberry *v.* Trowbridge, 13 Mich. 264. The same effect is produced by a promise to pay a part, and secure the residue if accepted. Standage *v.* Creighton, 5 C. & P. 406. And it has been held that a promise to pay a part will alone constitute a waiver of protest and notice as to the whole amount. Margetson *v.* Aitken, 3 Car. & P. 338; Dixon *v.* Elliott, 5 Car. & P. 437; Harvey *v.* Troup, 23 Miss. 538. But see Fletcher *v.* Froggatt, 2 C. & P. (12 Eng. C. L. R.) 569, to the effect that a promise to pay a part is only a waiver *pro tanto*.

[2] See Story on Notes, § 275; 1 Parsons' N. & B. 611; Lawrence *v.* Ralston 3 Bibb, 102; Donelly *v.* Howie, Hayes & J. 436; Cathcart *v.* Gibson, 1 Rich. 10; Huntington *v.* Harvey, 4 Conn. 124.

[3] See authorities in preceding notes. But there are some authorities to the contrary, which hold that the promise or part-payment will operate as a waiver, irrespective of his ignorance or knowledge of the default. Debuys *v.* Mollere, 15 Mart. (La.) 318; Bogart *v.* McClurg, 11 Heisk. 105. See Levy *v.* Peters, 9 Serg. & R. 125; Bank U. S. *v.* Lyman,

circumstances, the drawer or indorser could demand the return of the money so paid.[1] It is to be noted that ignorance of the fact that his promise would in law operate as a waiver, will not prevent its having that effect, if the party had knowledge of the default, since ignorance of the law excuses no one.[2] But ignorance of any material fact, which affects the liability of the party making the promise, will prevent the promise from operating as a waiver.[3]

The promise may be made at any time, even after suit is brought,[4] and while a motion for a new trial is pending.[5]

But in order that the promise to pay may operate as a waiver of demand and notice, it must be absolute and unconditional. Any conditional or uncertain promise to see to the payment will not suffice.[6] And the promise must be accepted.[7]

20 Vt. 666; Bibb *v.* Peyton, 12 Sm. & M. 575; Lane *v.* Steward, 20 Me. 98; Curtiss *v.* Martin, 20 Ill. 557; Read *v.* Wilkinson, 2 Wash. C. C. 514.

[1] National Bank of Commerce *v.* Nat. M. B. Assn., 55 N. Y. 211; Lawrence *v.* Am. Nat. Bank, 54 N. Y. 435; Crutchers *v.* Wolf, 2 Mon. 88.

[2] Mathews *v.* Allen, 16 Gray, 594; Third Nat. Bank *v.* Ashworth, 105 Mass. 503; Davis *v.* Gowan, 17 Me. 387; Pate *v.* McClure, 4 Rand. 164; Kennon *v.* McRae, 7 Port. (Ala.) 175; Hughes *v.* Bowen, 15 Iowa, 446; Cheshire *v.* Taylor, 29 Iowa, 492; Beck *v.* Thompson, 5 Har. & J. 537; Richter *v.* Selin, 8 Serg. & R. 425; Bilbie *v.* Lumley, 2 East, 469; Stevens *v.* Lynch, 12 East, 38; Givens *v.* Merchants' Nat. Bank, 85 Ill. 444.

[3] Low *v.* Howard, 10 Cush. 159; Arnold *v.* Dresser, 8 Allen, 435; Stevens *v.* Lynch, 2 Camp. 332; 12 East, 38.

[4] Oglesby *v.* Steamboat Co., 10 La. Ann. 117.

[5] Hart *v.* Long, 1 Rob. (La.) 83.

[6] Dennis *v.* Morrice, 3 Esp. 158 (if I am bound to pay I will); Keyes *v.* Festenmaker, 24 Cal. 329 (I would rather pay the note than be sued); Prideaux *v.* Collier, 2 Stark. 57 (I will see what I can do, and endeavor to provide effects); in these cases held to be no waiver. The same is true of any equivocal statement. Borradaile *v.* Lowe, 4 Taunt. 93; Sherrod *v.* Rhodes, 5 Ala. 683; Crain *v.* Colwell, 8 Johns. 384; Ross *v.* Hurd, 71 N. Y. 14; Tardy *v.* Boyd, 26 Gratt. 637.

[7] Sice *v.* Cunningham, 1 Cow. 397; Agan *v.* McManus, 11 Johns. 180; Barkalow *v.* Johnson, 1 Harr. 397; Laporte *v.* Landry, 17 Mart. (La.) 359; Newberry *v.* Trowbridge, 13 Mich. 637; Tardy *v.* Boyd, 26 Gratt. 637.

With these qualifications, however, the promise to pay will be sufficient, in whatever language it may be couched.[1]

Although some of the authorities hold that the promise to pay is itself presumptive evidence of knowledge of default in making demand and giving notice,[2] the better opinion is that, while such a promise may be taken as presumptive evidence of knowledge of default in giving the notice, it is not inconsistent with the belief that there has been a proper demand and protest, and hence the failure to make demand and protest must be proven affirmatively.[3] But while the promise to pay is not presumptive evidence of knowledge of the default in demand and notice, it is held that it will be taken as *prima facie* evidence of there having been proper

[1] Sigerson *v.* Mathews, 20 How. 496; Hopes *v.* Alder, 6 East, 16; Rogers *v.* Stephens, 2 T. R. 713; Donaldson *v.* Means, 4 Dall. 109; Rogers *v.* Hackett, 21 N. H. 100; Hopkins *v.* Liswell, 12 Mass. 52; Bryan *v.* Hunter, 36 Me. 207; Lane *v.* Stewart, 20 Me. 98; Read *v.* Wilkinson, 2 Wash. C. C. 514; Hart *v.* Long, 1 Rob. (La.) 83; Union Bank *v.* Grimshaw, 15 La. 321; Croxen *v.* Worthen, 5 M. & W. 5.

[2] 3 Kent's Com. 44; Thompson on Bills, 384; Barkalow *v.* Johnson, 1 Harr. 397; Landrum *v.* Trowbridge, 2 Met. (Ky.) 283; Nash *v.* Harrington, 1 Ark. 39; Hopley *v.* Dufresne, 15 East, 275; Taylor *v.* Jones, 1 Camp. 105; Croxen *v.* Worthen, 5 M. & W. 5; Loose *v.* Loose, 36 Pa. St. 538; Debuys *v.* Mollere, 15 Mart. (La.) 318. But a promise to pay, made after maturity, will not be presumptive evidence of knowledge of laches in making presentment for acceptance. Landrum *v.* Trowbridge, 2 Met. (Ky.) 283; Bank of Tenn. *v.* Smith, 9 B. Mon. 609; Philips *v.* McCurdy, 1 Har & J. 187.

[3] Thornton *v.* Wynn, 12 Wheat. 183; Sigerson *v.* Mathews, 20 How. 464; Ford *v.* Dallam, 3 Cold. 67; Blum *v.* Bidwell, 20 La. Ann. 43; Van Wickle *v.* Downing, 19 La. Ann. 83; Harvey *v.* Troup, 23 Miss. 538; Barkerville *v.* Harris, 41 Miss. 535; Hunter *v.* Hook, 64 Barb. 469; U. S. Bank *v.* Southard, 2 Harr. 473; Bank U. S. *v.* Leathers, 10 B. Mon. 64; Cheshire *v.* Taylor, 29 Iowa, 492; Davis *v.* Gowen, 17 Me. 387; Otis *v.* Hussey, 3 N. H. 346; Freeman *v.* O'Brien, 38 Iowa, 406; Kelley *v.* Brown, 5 Gray, 108; Lilly *v.* Petteway, 73 N. C. 358; Arnold *v.* Dresser, 8 Allen, 435; Ticknor *v.* Roberts, 11 La. 14; Walker *v.* Rogers, 40 Ill. 278; Farrington *v.* Brown, 7 N. H. 271; Jones *v.* Savage, 6 Wend. 658; Salisbury *v.* Renwick, 44 Mo. 454; Newberry *v.* Trowbridge, 13 Mich. 264; Kelley *v.* Brown, 5 Gray, 108; Williams *v.* Union Bank, 9 Heisk. 441.

demand and notice, throwing upon the defendant the burden of proving that there was no presentment and demand of the kind required by the law merchant.[1]

An admission of notice would operate as a waiver, if not made upon any mistake of fact, and in any event it is *prima facie* evidence of notice.[2]

§ 366. **What will not excuse default in presentment and notice.** — It frequently happens that circumstances will make it appear useless to make presentment, or harmless to dispense with notice, and yet presentment and notice are nevertheless required. Some of these cases will now be mentioned.

In the first place, the mere fact that the drawer or indorser will suffer no injury or wrong, if there should be a default in the presentment and notice, would not be a sufficient excuse, whether because there were no funds in the drawee's hands,[3] or on account of the bankruptcy or insolvency of the acceptor or maker, occurring before maturity.[4]

[1] Tebbetts *v.* Dowd, 23 Wend. 379; Hazard *v.* White, 26 Ark. 280; Lewis *v.* Brehme, 33 Md. 412; Dickerson *v.* Turner, 12 Ind. 223; Loose *v.* Loose, 36 Pa. St. 588; Bruce *v.* Lytle, 13 Barb. 163; Nash *v.* Harrington, 1 Ark. 39; Dorsey *v.* Watson, 14 Mo. 59; Commercial Bank *v.* Clark, 28 Vt. 325; Gibbon *v.* Coggen, 2 Camp. 188; Taylor *v.* Jones, 2 Camp. 105; Stevens *v.* Lynch, 2 Camp. 332; 12 East, 38; Hopes *v.* Alder, 6 East, 16; Potter *v.* Rayworth, 13 East, 417; Campbell *v.* Webster, 2 C. B. 258; Gunson *v.* Metz, 1 B. & C. 193; Dixon *v.* Elliott, 5 C. & P. 437; Jones *v.* O'Brien, 26 E. L. & Eq. 283; Chapman *v.* Annette, 1 C. & K. 552; Pickin *v.* Graham, 1 Cromp. & Mees. 725; Blesard *v.* Hirst, 5 Burr. 2670.

[2] Commercial Bank *v.* Clark, 28 Vt. 325; Andrews *v.* Boyd, 3 Met. 434.

[3] Cory *v.* Scott, 3 B. & Ald. 519; Mechanic's Bank *v.* Griswold, 7 Wend. 165; Commercial Bank *v.* Hughes, 17 Wend. 94; Ex parte Heath, 2 Ves. & B. 240; Carter *v.* Flower, 16 M. & W. 743; Clegg *v.* Cotton, 3 Bos. & P. 239; Foster *v.* Parker, 2 C. P. Div. 18; French *v.* Bank of Columbia, 4 Cranch, 141; Nash *v.* Harrington, 2 Aitkens, 9; Bickerdile *v.* Bollman, 1 T. R. 405; May *v.* Coffin, 4 Mass. 341; Hill *v.* Heap, Dow. & R. 15; Hill *v.* Martin, 12 Mart. (La.) 177. But see *contra* Mogadars *v.* Holt, 1 Show. 317; 12 Mod. 15.

[4] Nicholson *v.* Gouthitt, 2 H. Bl. 609; Warrington *v.* Farbor, 8 East,

And the drawer or indorser is entitled to presentment, even though he knows of the insolvency.[1] So, also, will the bankruptcy of the drawer or indorser be no excuse for failure to give him notice of dishonor.[2]

In the second place, the death of the maker or acceptor will not excuse presentment for payment; if there be a personal representative, presentment should be made to him.[3] But if there be no personal representative, demand should be made at the deceased's residence,[4] unless the

242; Smith *v.* Becket, 13 East, 187; Leach *v.* Hewitt, 4 Taunt. 731; Bowes *v.* Howe, 5 Taunt. 30; Esdaile *v.* Sowerby, 11 East, 114; Thackeray *v.* Blackett, 3 Comp. 164; Cory *v.* Scott, 3 B. & Ald. 619; Free *v.* Hawkins, 8 Taunt. 92; May *v.* Coffin, 4 Mass. 341; Benedict *v.* Coffee, 5 Duer, 226; Hunt *v.* Wadleigh, 26 Me. 271; Johnson *v.* Harth, 1 Bailey, 482; Course *v.* Shackleford, 2 Nott & McC. 283; Hightower *v.* Ivy, 2 Port. (Ala.) 308; Wash *v.* Harrington, 2 Aik. 9; Schofield *v.* Bayard, 3 Wend. 488; Armstrong *v.* Thurston, 11 Md. 148; Shaw *v.* Reed, 12 Pick. 132; Lawrence *v.* Langley, 14 N. H. 70; Clair *v.* Barr, 2 Marsh. 255; Watkins *v.* Crouch, 5 Leigh, 522; Walton *v.* Watson, 1 Mart. (N. S.) 347; Brown *v.* Ferguson, 4 Leigh, 53; Barton *v.* Baker, 1 S. &. R. 334; Cedar Falls Co. *v.* Wallace, 83 N. C. 225; Denny *v.* Palmer, 5 Ired. 610; Bank of Seaford *v.* Connoway, 4 Houst. 206; Jackson *v.* Richards, 2 Caines, 343; Cole *v.* Wintercost, 12 Tex. 118; Crossen *v.* Hutchinson, 9 Mass. 205. *Contra* Bogy *v.* Keil, 1 Mo. 743; Strothart *v.* Parker, 1 Overt. 260; De Berdt *v.* Atkinson, 2 H. Bl. 336.

[1] Sanford *v.* Dillaway, 10 Mass. 52; Sussex Bank *v.* Baldwin, 2 Harr. 487; Jervey *v.* Wilbur, 1 Bailey, 453; Wilson *v.* Senier, 14 Wis. 411; Groton *v.* Dallheim, 6 Me. 476; Buck *v.* Cotton, 2 Conn. 126. But see *contra*, 1 Cranch C. C. 23; Leech *v.* Hill, 4 Watts, 448; McClellan *v.* Clarke, 2 Brev. 106 (knowledge at time of indorsement); Clark *v.* Minturn, 5 Brev. 186, in the case of notorious insolvency.

[2] Story on Notes, § 290; Story on Bills, § 348; Esdaile *v.* Somerby; 11 East, 117; May *v.* Coffin, 4 Mass. 341; Hawley *v.* Jette, 10 Ore. 31; Ex parte Rhode, Mont. & M. 430. See *contra*, Fleming *v.* McClure, 1 Brev. 428, notorious insolvency; Mobley *v.* Clark, 28 Barb. 390.

[3] See *ante* § 313. But see Hale *v.* Burr, 12 Mass. 86, where it is held to be useless to make demand on a personal representative, since he is permitted by the law of administration to take a given time to settle up the estate and to pay debts.

[4] Magender *v.* Bank of Georgetown, 3 Pet. 87; Juniata Bank *v.* Hale, 16 Serg. & R. 157; Story on Notes, § 241; Story on Bills, § 346.

paper is payable at a particular place, when presentment at that place will be sufficient.[1] Since the personal representative has no authority in his representative capacity to accept bills of exchange, it would be useless to present bills for acceptance.[2]

In like manner, in the case of the death of a drawer or indorser, the notice should be given to his personal representative.[3]

If the drawer or indorser is appointed as the personal representative of the maker or acceptor, the knowledge which he gains in his representative capacity will not excuse the want of presentment and notice. Both are still required.[4]

In the third place, when the bill or note has been lost or mislaid, and has not been found in time to make presentment, the demand should be made without presenting it, the demand being accompanied by a statement of its loss, and by an offer to give a bond of indemnity to the maker against a subsequent presentation of the paper by a *bona fide* holder.[5] But indemnity can not be required, where the

[1] Chitty [*356, 357], 399; Story on Notes, § 253; 2 Daniel's Negot. Inst., § 1177.

[2] 2 Daniel's Negot. Inst., § 1178; *ante* § 146; Smith *v.* Bank, L. R. 4 P. C. 194.

[3] See *ante* 336.

[4] Magruder *v.* Union Bank, 3 Pet. 87; 7 Pet. 287; Carolina Nat. Bank *v.* Wallace, 13 S. C. 347; Story on Bills, § 376. Even when the maker dies insolvent. Gower *v.* Moore, 25 Me. 16; Lawrence *v.* Langley, 14 N. H. 70; Johnson *v.* Haith, 1 Bailey, 482. But see Caunt *v.* Thompson, 7 C. B. 400. Where the drawer answered the demand of the holder on the acceptor by saying that the acceptor was dead, and that he was his executor, and asking the bill to be held back for a few days, when he would see to its payment. There was held to be sufficient notice of dishonor.

[5] Fisher *v.* Carroll, 6 Ired. Eq. 485; Freeman *v.* Boynton, 7 Mass. 483; Donelson *v.* Taylor, 8 Pick. 390; Fales *v.* Russell, 16 Pick. 315; Almy *v.* Reed, 10 Cush. 421; Exchange Bank *v.* Morrall, 16 W. Va. 546; 2 Parsons' N. & B. 302. The indemnity should be tendered to every party of whom payment is demanded. Smith *v.* Rockwell, 2 Hill, 484; Wilder *v.* Seelye, 8 Barb. 410.

paper is non-negotiable,[1] or where it is payable to order and has been specially indorsed, if indorsed at all;[2] when it is definitely proved to have been destroyed;[3] when it has found its way into the possession of the maker or acceptor;[4] and, *finally*, when the action on the paper would, as against any other party plaintiff, be barred by the statute of limitations.[5]

If a bill is originally drawn in duplicates, the duplicate should be presented if the original is lost; but in such a case, whatever discharges a party from liability on the original, will preclude recovery on the duplicate. If, however, a duplicate is issued subsequently in consequence of the loss of the original, any necessary delay in presenting the

[1] Wright *v.* Wright, 54 N. Y. 437; Clark *v.* Reed, 12 Smed. & M. 554; Lazell *v.* Lazell, 12 Vt. 443; 2 Parsons' N. & B. 303.

[2] Rawley *v.* Ball, 3 Cow. 303; Pinterd *v.* Tackington, 10 Johns. 104; Rogers *v.* Miller, 4 Scam. 333; Depew *v.* Whelan, 6 Blackf, 485; Dean *v.* Speakman, 7 Blackf. 317; Price *v.* Dunlap, 5 Cal. 483; Hough *v.* Barton, 20 Vt. 455; Long *v.* Baillie, 2 Camp. 214; Ralt *v.* Watson, 4 Bing. 273; 11 J. B. Moore, 510; Mossop *v.* Eadon, 16 Ves. 430; Branch Bank *v.* Tillman, 12 Ala. 214; Moore *v.* Fall, 42 Me. 450; Cleveland *v.* Worrell, 13 Ind. 545. *Contra* Ramuz *v.* Growe, 1 Exch. 167; Crowe *v.* Clay, 9 Exch. 604; overruling Clay *v.* Crowe, 8 Exch. 295.

[3] Hinsdale *v.* Bank of Orange, 6 Wend. 378; Wright *v.* Maidstone, 1 Kay & J. 701; Scott *v.* Meeker, 20 Hun, 163; Des Arts *v.* Leggett, 16 N. Y. 582; Woodford *v.* Whitely, Moody & M. 517; Clark *v.* Quince, 3 Dowl. 26; Blackie *v.* Pidding, 6 C. B. 196; Pierson *v.* Hutchinson, 2 Camp. 211; Thayer *v.* King, 15 Ohio, 242; Moses *v.* Trice, 21 Gratt. 556; Patton *v.* State Bank, 2 Nott & McC. 464; Dean *v.* Speakman, 7 Blackf. 317; Aborn *v.* Bosworth, 1 R. I. 401; Wells *v.* Wade, 20 Kan.——; Moore *v.* Fall, 42 Me. 450; Bank of U. S. *v.* Sill, 5 Conn. 106; Hough *v.* Barton, 20 Vt. 455; Branch Bank *v.* Tillman, 12 Ala. 214; Wade *v.* Wade, 12 Ill. 89.

[4] Smith *v.* McClure, 5 East, 476; Paterson *v.* Hardacre, 4 Taunt. 114; De la Chaumette *v.* Bank of England, 9 B. & C. 208; 2 B. & Ad. 385; Murray *v.* Burling, 10 Johns. 172; Buck *v.* Kent, 3 Vt. 99; Knight *v.* Legh, 4 Bing. 589; Decker *v.* Mathews, 2 Kern. 313; Lamb *v.* Moberly, 3 T. B. Mon. 179.

[5] Torrey *v.* Foss, 40 Me. 74; Moore *v.* Fall, 42 Me. 450; 2 Parsons' N. & B. 296, 303.

duplicate will be excused.[1] And so, also, will a reasonable delay be excused, if a bill payable at sight is lost or mislaid.[2]

In the fourth place, if in executing a bill or note, it is misdated, so that the place of residence of the maker or acceptor is not given, demand should be made at the place of the date, unless he knows of his residence, when the demand should be made at the place of residence.[3] But the holder will be excused, if presentment should be delayed in consequence of the holder being misled by the misdating of the paper.[4] There are, however, authorities which maintain, that the holder is not compelled to make presentment anywhere else than at the place of the date, even though the maker or acceptor cannot be found there, and has no residence or place of business at that place.[5]

§ 367. **Transfer by delivery as security.** — It has also been held that the transferrer by delivery, of paper payable to order, without indorsement and as collateral security, is not entitled to a strict presentment at maturity; and he is not relieved of liability, unless he can show actual damage by reason of the want of presentment.[6] The reason for this ruling is to be found in the fact that the transfer is not according to the law merchant; the transferrer is not liable as an indorser, and consequently the transferee is not required as to him to make presentment or to give notice of dishonor.[7]

[1] Benton *v.* Martin, 1 Hand, 346; 51 N. Y. 572; Benton *v.* Martin, 31 N. Y. 382.

[2] Aborn *v.* Bosworth, 1 R. I. 403.

[3] Taylor *v.* Snyder, 3 Den. 145; Burrows *v.* Hannegan, 1 McLean, 309; Bk. of Orleans *v.* Whittemore, 12 Gray, 473; 1 Parsons' N. & B. 459, note *c*.

[4] Smith *v.* Philbrick, 10 Gray, 252; Stayler *v.* Williams, 24 Md. 199; Apperson *v.* Bynum, 5 Cold. 348; Meyer *v.* Hibscher, 47 N. Y. 270; Moodie *v.* Morrall, 3 Const. 367.

[5] Story on Notes, § 1236; Hepburn *v.* Toledano, 10 Mart. (La.) 643.

[6] Van Wart *v.* Woolley, 3 B. & C. 439; Swinyard *v.* Bowes, 5 M. & S. 62; Story on Bills, § 372; Story on Notes, § 284.

[7] 1 Parsons' N. & B. 503; Story on Bills, § 372; 2 Daniel's Negot. Inst., § 1176. See *ante*, § 310.

CHAPTER XIX.

PAYMENT AND ITS EFFECTS.

SECTION 371. Payment distinguished from sale or transfer.
372. Who may make payment.
373. What payor can demand.
374. To whom payment may be made.
375. Payment made with what.
376. Effect of payment.
377. Appropriation of payment.
378. Payment *supra protest*, or for honor.
379. Payment by note or bill, when absolute or conditional.
380. Presumptions in respect to absolute and conditional payments, how rebutted.
381. Right of action suspended by taking bill or note in payment of debt.
382. Duties of holders of bill or note taken in payment.

§ 371. **Payment distinguished from sale or transfer.** — Payment consists of the performance of a contract, with the intention of extinguishing the liability of the party paying, or the party for whom the payment is made. The same acts may and do constitute a sale when the parties intend to transfer, instead of extinguishing, the claim on the contract. But in order that the transaction might constitute a sale, the party paying and the party receiving it must agree that it shall be a sale. The presumption of law is strongly in favor of its being a payment, and this presumption can only be rebutted by strong proof of a contrary intention.[1] Any secret understanding that the

[1] Lancey *v.* Clark, 64 N. Y. 209; *s. c.* 8 N. Y. S. C. (3 Hun) 575; Eastman *v.* Plumer, 32 N. H. 238; Greening *v.* Patten, 51 Wis. 150; Burr *v.* Smith, 21 Barb. 262, Wells, J., saying: "It is true he (the stranger) declined having it cancelled; but that circumstance was not enough to

party paying shall buy the paper for the person who furnishes the money will not change the character of the transaction to a sale.[1]

§ 372. **Who may make payment.** — Any party to the instrument, who is primarily or secondarily liable on it, may make or tender payment. And an indorser can, by making payment, acquire the right to recover on the instrument against the prior indorsers, the drawer, and the primary obligors, although he has been discharged from liability by the want of notice of dishonor.[2] But a stranger to the instrument has no right to make payment, without the consent of the holder, unless he acts as the agent of a party, who is liable, or makes payment *supra protest*.[3] Of course the personal representative of a party to the paper may make or tender payment.

§ 373. **What payor can demand.** — The payor may always demand the right to examine the paper in order to assure himself of the genuineness of the signatures; for if the payment is made to the wrong party, it does not extinguish the liability of the payor to the rightful party, who could demand a second payment.[4] But since the money

overcome the presumption arising from the facts proved, that it was paid and extinguished. It does not prove a purchase, and unless it was purchased by Riley (the stranger), it was satisfied." The question is one for the jury to determine in the light of all the circumstances of the case. Dougherty *v.* Deeney, 45 Iowa, 443; Swope *v.* Leflingwell, 72 Mo. 348.

[1] Eastman *v.* Plumer, 32 N. H. 238; Greening *v.* Patten, 51 Wis. 150.

[2] Ellsworth *v.* Brewer, 11 Pick. 316. But such an indorser could not hold liable the parties to another instrument, which had been deposited with him as security for his indorsement. Bachellor *v.* Priest, 12 Pick. 399.

[3] Burton *v.* Slaughter, 26 Gratt. 919. But in the case of a stranger making payment, it is always open to inquiry whether a payment or a sale was intended. Deacon *v.* Stodhart, 2 Man. & G. 317. See *post*, § 378.

[4] Smith *v.* Chester, 17 J. R. 654; Wheeler *v.* Guild, 20 Pick. 545; Wilcox

was in such cases paid under a mistake of fact, it could be recovered back in an appropriate action,[1] which may be done, whenever money is paid under a mistake of facts, but not under a mistake of law.[2] And in tendering the payment, he can demand the surrender to him of the paper itself, for the possession of the paper by one who is liable on it, — particularly a primary obligor, — is presumptive evidence that he has paid.[3] It has also been held, although it is very doubtful, that the payor may demand a receipt of payment to be written across the paper.[4] But whether it can be demanded or not, it is very desirable to obtain a receipt as the highest and best evidence of payment,[5] although the possession of the paper is sufficient presumptive proof of payment.[6]

v. Aultman, 64 Ga. 544; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Davis *v.* Miller, 14 Gratt. 1; Goddard *v.* Merchants' Bank, 2 Sandf. 247. This is true even though it is paid to one who bears the same name, as does the rightful party. Adams *v.* Reeves, 68 N. C. 134.

[1] Roscoe *v.* Hardy, 12 East, 434; Turner *v.* Leeche, 4 Barn. & Ald. 451.

[2] Martin *v.* Morgan, 3 Moore, 635; Milnes *v.* Duncan, 6 B. & C. 671; Talbot *v.* Nat. Bank, 129 Mass. 67; Adams *v.* Reeves, 68 N. C. 134.

[3] Otisfield *v.* Mayberry, 63 Me. 197; Freeman *v.* Boynton, 7 Mass. 486; Best *v.* Crall, 23 Kan. 482; Dugan *v.* U. S., 3 Wheat. 172; Brinkley *v.* Going, 1 Breese, 288; Norris *v.* Badger, 6 Cow. 449; Moses *v.* True, 21 Gratt. 556; Hansard *v.* Robinson, 7 B. & C. 90; Pfiel *v.* Vanbatenberg, 2 Camp. 439; Barring *v.* Clark, 19 Pick. 230. And the party paying may maintain trover for it, after having made payment. Neal *v.* Hanson, 60 Me. 84; Buck *v.* Kent, 3 Vt. 99; Pierce *v.* Gilson, 9 Vt. 216; Spencer *v.* Dearth, 43 Vt. 98; Stone *v.* Clough, 41 N. H. 290.

[4] Chitty on Bills (13th Am. ed.) [*423], 477; Story on Notes, § 422.

[5] Scholey *v.* Walsby, Peake Cas. 24; Jones *v.* Fort, 9 B. & C. 764. But the possession of a receipt is only *prima facie* proof of payment; it may be rebutted by parol evidence, showing fraud or mistake. Scholey *v.* Walsby, *Supra.*; Chitty on Bills [*424], 478.

[6] Dugan *v.* United States, 3 Wheat. 472; Bowie *v.* Duvall, 1 Gill & J. 175; Wickersham *v.* Jarvis, 2 Mo. App. 280; Campbell *v.* Humphreys, 2 Scam. 478; Warren *v.* Gilman, 15 Me. 70; Bank of Kansas City *v.* Mills, 24 Kan. 610; Bond *v.* Storrs, 13 Conn. 412; Brinkley *v.* Going, 1 Breese, 228. But see *contra* Mendez *v.* Carreroon, 1 Ld. Raym. 742.

§ 374. **To whom payment may be made.** — The payment can only be made to the holder, or to his duly authorized agent. If the paper is payable to bearer, or has been indorsed in blank, it is payable to any one who has the possession of it, although he may be a thief.[1] But if the paper is payable to order, payment to any one but the person to whose order it is made payable, will not discharge the liability of the payor on the instrument, unless the person receiving payment was, in fact, entitled to receive payment, either as a lawful transferee or as the authorized agent of the holder. Possession in such cases is not presumptive evidence of ownership.[2] But indorsement is not necessary, if the holder proves by other testimony his right to demand payment. Thus payment may be made to the assignee of a bankrupt, the personal representative of a deceased holder, the guardian of an insane person or infant, and to the husband wherever he has still the common-law authority to reduce his wife's *choses in action* to possession.[3] And payment under such circumstances and knowingly, to the bankrupt, insane person, ward, or wife, would not be a valid discharge from liability.[4] If the paper is payable to

[1] Mauran *v.* Lamb, 7 Cow. 174; Bank of U. S. *v.* U. S., 2 How. 711; Dugan *v.* United States, 2 Wheat. 172; Adams *v.* Oakes, 6 Car. & P. 70; Goodman *v.* Harvey, 4 Ad. & E. 870; Merritt *v.* N. Y., etc., R. R. Co., 21 N. Y. S. C. (14 Hun) 324; Bachellor *v.* Priest, 12 Pick. 406; Bank of Utica *v.* Smith, 18 Johns. 230; Owen *v.* Barrow, 4 Bos. & P. 101.

[2] Porter *v.* Cushman, 19 Ill. 572; Doubleday *v.* Kress, 50 N. Y. 413; Pease *v.* Warren, 29 Mich. 9; Paris *v.* Moe, 60 Ga. 90. See *contra* Bachellor *v.* Priest, 12 Pick. 406.

[3] 2 Daniel's Negot. Inst., § 1231; Chitty on Bills [*393, *et seq.*], 444, 447; 2 Parsons' N. & B. 211.

[4] Kitchen *v.* Bartsch, 7 East, 53; White *v.* Palmer, 4 Mass. 147; Leonard *v.* Leonard, 14 Pick. 280; Barlow *v.* Bishop, 1 East, 432. It is held in the case of a married woman, that payment to her will not discharge the acceptor of a bill made payable to her before her marriage, although he does not know of her marriage. Story on Bills, § 413.

one person, to the use of another, payment must be made to the former.[1]

§ 375. **Payment made with what.** — In negotiable paper, payment can only be made with money, *i.e.*, legal tender, except with the consent of the holder. If a paper calls in general terms for the payment of a given sum of dollars, the payor can make payment in any kind of legal tender, and the holder cannot insist upon the selection of any one kind with which to make payment. And even where one kind of legal tender is depreciated in value, as in the case of the United States treasury notes, during and after the American civil war, it does not interfere with the right of the payor to select the depreciated money.[2] And the selection of the more valuable kind of legal tender does not entitle the payor to any discount in compensation for the difference in value between the coin and the depreciated treasury notes.[3] But if the government has changed the intrinsic value of the coins, without changing their denominations, after a contract has been made, the contract can only be fully performed by a tender of the value of the given amount of the money, according to the old standard of value.[4] The legal tender, in the United States, constitutes at present the gold and silver coin of the denomination of one dollar and over, and the United States treasury notes. The constitutionality of the acts of Congress, which have made these notes legal tender, has been very seriously questioned and in one case denied by the Supreme Court of the United States,[5] the position being taken that Congress had no power to make legal tender of anything which

[1] Cramlington *v.* Evans, 2 Vent. 307; Clark *v.* Litcomb, 42 Barb. 122.

[2] Killough *v.* Alford, 32 Tex. 457.

[3] Bush *v.* Baldrey, 11 Allen, 367.

[4] Pilkinton *v.* Comrs. of Claims, 2 Knapp, 17; Da Costa *v.* Cole, Holt, 465; Skin. 272; Field, J., in Juillard *v.* Greenman, 110 U. S. 465.

[5] Hepburn *v.* Griswold, 8 Wall. 604.

had no intrinsic value.[1] But in later cases, the Federal Supreme Court has pronounced these acts to be constitutional, and this may be taken as a definite settlement of the question.[2]

But if the contract calls for any particular kind of legal tender, it can only be satisfied by a tender of that kind, and the holder may refuse to receive any other.[3] If, however, in such a case the depreciated treasury notes are tendered and accepted, in payment of the paper, the holder can only require a payment to him of the amount called for by the paper, and cannot insist upon the payment of a premium, to compensate the difference in value between the gold and the treasury notes.[4]

If the paper is expressly made payable in anything but legal tender, as where it is payable in currency or in National bank-notes, the paper is non-negotiable;[5] but it is otherwise binding upon the parties, and a tender of the given number of dollars in the kind of currency named will be a good tender.[6]

[1] See Tiedeman on Police Power, § 90, for a full discussion of this question.

[2] Legal Tender Cases, 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 605; Bigler *v.* Waller, 14 Wall. 298; Railroad Co. *v.* Johnson, 15 Wall. 195; Juillard *v.* Greenman, 110 U. S. 421.

[3] Bronson *v.* Rhodes, 7 Wall. 245; Butler *v.* Horwitz, 7 Wall. 259; Dewing *v.* Sears, 11 Wall. 379; Trebilock *v.* Wilson, 12 Wall. 687; Phillips *v.* Dugan, 21 Ohio St. 466; McGoon *v.* Shirk, 54 Ill. 408 (overruling Humphrey *v.* Clement, 44 Ill. 299; Whetstone *v.* Colley, 36 Ill. 328); Smith *v.* Wood, 37 Tex. 620; Luck *v.* Faulkner, 25 Cal. 404; Higgins *v.* B. R. & Am. & M. Co., 27 Cal. 158. But see Wood *v.* Bullens, 6 Allen, 518; Killough *v.* Alford, 32 Tex. 457, where the paper, being payable "in gold coin or the equivalent thereof in United States legal tender notes," was held to be discharged by the payment of the given number of dollars in United States treasury notes.

[4] Gilman *v.* County of Douglass, 6 Nev. 27.

[5] See *ante*, § 29*a*

[6] Trebilock *v.* Wilson, 12 Wall. 694; Taup *v.* Drew, 10 How. 218; Rucker *v.* Dearing, 18 Gratt. 438; McCord *v.* Ford, 3 Mon. 166; David *v.*

While nothing but money can be lawfully tendered in payment of a bill or note, the parties themselves may agree upon the use of something else in payment.[1] But an agent cannot, without explicit authority, receive anything but money in liquidation of a debt.[2]

It is not necessary, however, that the money should exchange hands. The mere giving of credit by the payor to the payee will constitute a payment, if accepted.[3] The effect of making payment with checks is discussed elsewhere.[4]

§ 376. **Effect of payment.** — Payment always has the effect of extinguishing the liability of the party paying; but whether it extinguishes the contract itself depends upon the character and liability of the party paying. If the party paying is the primary obligor, all the parties to the paper are discharged, for all the other parties merely guarantee the payment by the primary obligor. This is not only the case where the primary obligor in fact is likewise the primary obligor in name, as in the case of the maker of a promissory note, or the acceptor of a bill of exchange;[5] but also where the payment is made by a secondary obligor, a drawer or indorser, for whose accommodation the paper was issued. The fact that it was issued for his accommodation makes him the primary obligor, and payment by him

Phillips, 7 Mon. 632; Chambers *v.* George, 5 Litt. 335; Ruston *v.* Noble, 4 J. J. Marsh. 130; Dillard *v.* Evans, 4 Ark. 175.

[1] See *post*, § 379.

[2] De Mets *v.* Dogon, 53 N. Y. 635; Moye *v.* Cogdell, 69 N. C. 93; Herrimon *v.* Shomon, 24 Kan. 387; Bank of Kansas City *v.* Mills, 24 Kan. 610; Maddur *v.* Bevan, 39 Md. 485; Speur *v.* Ledergerber, 56 Mo. 465; Chapman *v.* Cowles, 41 Ala. 103.

[3] Savage *v.* Merle, 5 Pick. 83; Pacific Bank *v.* Mitchell, 9 Met. 297.

[4] See *post*, Chapter on Checks.

[5] Suydam *v.* Westfall, 2 Den. 205; Gordan *v.* Wansey, 21 Cal. 77; Gardner *v.* Maynard, 7 Allen, 456; Eastman *v.* Plumer, 32 N. H. 238.

cancels the instrument.[1] In such cases the party paying cannot re-issue the paper, so as to give the transferee any right of action against the other parties, for the reason that he himself has no such right of action,[2] although the party so transferring by indorsement becomes liable himself as an indorser.[3]

Where the secondary obligor is really the primary obligor, because the bill or note has been given for his accommodation, and the acceptor or maker makes the payment, the liabilities on the instrument are so far extinguished as to prevent its being re-issued or sued upon by the acceptor or maker;[4] but the acceptor or maker may put it in as evidence of the amount of his claim in an action against the accommodated party, for the amount so paid on his account.[5]

Where the payment is made by a secondary obligor, who is not an accommodated party, his payment simply extinguishes his own liability and the liability of subsequent indorsees, and leaves intact the causes of action against the primary obligors, and all prior secondary obligors.[6] For

[1] Jones *v.* Broadhurst, 9 C. B. 173; Lazarus *v.* Cowie, 3 Q. B. (43 E. C. L. R.) 459; Beck *v.* Robley, 1 H. Bl. 89m; Bacon *v.* Searles, 1 H. Bl. 88; Walwyn *v.* St. Quintin, 1 B. & P. 652; Gardner *v.* Maynard, 7 7 Allen, 457.

[2] See cases cited in last two notes.

[3] Guild *v.* Eager, 17 Mass. 615; Hubbard *v.* Jackson, 4 Bing. 390; Callow *v.* Lawrence, 3 M. &. S. 95; Mead *v.* Small, 2 Greenl. 207.

[4] Bell *v.* Norwood, 7 La. 95; Stark *v.* Alford, 49 Tex. 260; Griffith *v.* Reed, 21 Wend. 502.

[5] Bank of Vergennes *v.* Cameron, 7 Barb. 143; Baker *v.* Martin, 3 Barb. 634.

[6] The party so paying may, of course, recover of these parties the amount he has paid in the extinguishment of his secondary liability. Johnson *v.* Kennion, 2 Wils. 262; Jones *v.* Broadhurst, 9 C. B. 173; Callow *v.* Lawrence, 3 M. & S. 95; Hubbard *v.* Jackson, 1 M. & P. (17 E. C. L. R.) 11; 2 Parsons' N. & B. 218; but the drawer or indorser must produce the note or bill, in order to succeed in his action against the acceptor or maker. Jones *v.* Broadhurst, *supra;* Thornton *v.* Maynard, 10 Com. Pl. L. R. 695.

this reason a drawer or indorser may, under these circumstances, after cancelling the subsequent indorsements, reissue the paper, and transfer his rights of action against the other parties.[1] But the transfer of a negotiable instrument after dishonor is a separate, independent contract; and where the transfer is made by indorsement, the indorsement must be made "to order" or "to bearer," in order to enable any subsequent indorsee to recover on the paper in his own name, where the common-law prohibition of the assignment of *choses in action* has not been abolished.[2]

If the paper is surrendered under the mistaken notion that the whole amount had been paid, instead of only a part, the balance may be recovered, notwithstanding the surrender. This is only permissible, however, when it is the result of some accident, mistake or fraud.[3]

§ 377. **Appropriation of payment.** — When one is indebted to another on two or more accounts or instruments of indebtedness, and payment is made in amounts not sufficient to satisfy all, it is often difficult to determine in detail to which debt the payment should be appropriated. But the following general rules may be deduced from the adjudications upon the subject: —

1. When the payment is voluntary, and is not made under the stress of legal process, the debtor has the right to make the appropriation to whatever item or account he pleases,[4] even to the prejudice of one who is security for

[1] St. John *v.* Roberts, 31 N. Y. 441; Kirksey *v.* Bates, 1 Ala. 303; Montgomery R. R. Co. *v.* Trebles, 44 Ala. 258; French *v.* Jarvis, 29 Conn. 348; Callow *v.* Lawrence, 3 M. & S. 95; Williams *v.* James, 15 Ad. & El. (N. S.) 499; West Boston Savings Inst. *v.* Thompson, 124 Mass. 506. See Fenn *v.* Dugdale, 40 Mo. 63.

[2] Leavitt *v.* Putnam, 1 Sandf. 199.

[3] Banks *v.* Marshall, 23 Cal. 223; Kent *v.* Reynolds, 15 N. Y. S. C. (8 Hun) 559.

[4] Taylor *v.* Sandford, 7 Wheat. 13; United States *v.* January, 7 Cranch, 572; Miller *v.* Trevillian, 2 Rob. 1; Hooper *v.* Keay, 1 Q. B. Div. 178;

one of the debts.[1] As between the debtor and creditor, the debtor has until the bringing of the suit, in which to make the appropriation; but as to third parties, he must make the appropriation within a reasonable time.[2]

2. If the debtor does not make the appropriation, the creditor may apply it as he pleases.[3] But it has been held, with much show of reason for it, that if the debtor has, for any reason, not had an opportunity to make the appropriation, the creditor cannot exercise the right of appropriation.[4] It is likewise denied to the creditor to make the appropriation to a debt, which is not yet due, if there are debts already due;[5] so, also, to a debt whose validity has been denied by the debtor.[6] The right of appropriation is otherwise unconditional, and in the exercise of the right the creditor can apply the payment to a debt barred by the

Howard *v.* McCall, 21 Gratt. 205; Lingle *v.* Cook, 32 Gratt. 272; Whittaker *v.* Pope, 48 Ga. 13; Simson *v.* Ingham, 2 B. & C. 72; Harding *v.* Wormley, 8 Baxt. 578; Clarke *v.* Scott, 45 Cal. 86; Sprinkile *v.* Martin, 72 N. C. 92. After making the appropriation, the debtor cannot change it. Mayor of Alexandria *v.* Patten, 4 Cranch, 317; Hill *v.* Sutherland, 1 Wash. (Va.) 128; Hubbell *v.* Flint, 15 Gray, 550.

[1] Goddard *v.* Cox, 2 Stra. 1194; Kirby *v.* Duke of Marlborough, 2 Maule & S. 18; Chitty on Bills [*402], 454.

[2] Philpott *v.* Jones, 2 A. E. 41; Mayor of Alexandria *v.* Patten, 4 Cranch, 317; United States *v.* Kirkpatrick, 9 Wheat. 720; Johnson *v.* Johnson, 30 Ga. 857; Pattison *v.* Hull, 9 Cow. 747.

[3] Woods *v.* Sherman, 71 Pa. St. 100; Allen *v.* Culver, 3 Den. 284; Harding *v.* Wormley, 8 Baxt. 578; Smith *v.* Screven, 1 McCord, 368; Chapman *v.* Commissioners, 25 Gratt. 721; Lingle *v.* Cook, 32 Gratt. 272; Bennett *v.* Wilder, 67 Ill. 327; Bean *v.* Brown, 54 N. H. 395; Pattison *v.* Hull, 9 Cow. 747. The creditor cannot change the appropriation after having once made it. Mayor of Alexandria *v.* Patten, 4 Cranch, 317; Bank of N. A. *v.* Meredith, 2 Wash. C. C. 47; Hill *v.* Southerland, 1 Wash. (Va.) 128; White *v.* Trumbull, 3 Green (N. J.), 314; Tooke *v.* Bonds, 29 Tex. 419; Harding *v.* Wormley, 8 Baxt. 578. It is otherwise, if the debtor has not been notified. Hankey *v.* Hunter, Peake Ad. Cas. 107.

[4] 2 Parsons on Contracts [*631], 764; Waller *v.* Lacy, Man. & G. 54.

[5] Bobe *v.* Stickney, 36 Ala. 482.

[6] Taylor *v.* Sandford, 7 Wheat. 13.

statute of limitations, even against the will of the debtor. But such an appropriation will not take the debt out of the statute as to the balance.[1] The creditor cannot, however, apply the payment to an illegal debt, *i.e.*, one which is absolutely void in law.[2]

But in order that the debtor may make an appropriation, it is not necessary for him to make an express declaration to the creditor. Any facts or circumstances which show an intention to make an appropriation, will be binding upon the creditor, and deprive him of the right to make the appropriation,[3] even though the creditor is unwilling to accede to the debtor's wishes or receives payment with a different intention.[4]

3. When neither debtor nor creditor has made the appropriation, it will be applied by law, in the manner which best conforms to principles of equity, and to the probable intention of the parties. Where principal and interest are due, the payment will be applied first to the interest and then to the principal.[5]

[1] Mills *v.* Foulke, 5 Bing. N. C. 455; Nash *v.* Hodgson, 6 DeG. & M. & G. 474; Pond *v.* Williams, 7 Gray, 630; Williams *v.* Griffith, 5 M. & W. 300; Logan *v.* Mason, 6 Watts & S. 9; Ayer *v.* Hawkins, 19 Vt. 26; Livermore *v.* Rand, 26 N. H. 85; Watt *v.* Hoch, 25 Pa. St. 411; Phillips *v.* Moses, 65 Me. 70; Brown *v.* Burns, 67 Me. 535.

[2] Caldwell *v.* Wentworth, 14 N. H. 431; Wright *v.* Laing, 3 B. & C. 165; Arnold *v.* The Mayor, etc., of Poole, 4 Man. & G. 860; Ex parte Randleson, 2 Deacon & Ch. 534. But see *contra* Philpott *v.* Jones, 2 A. & E. 41; Cruickshanks *v.* Rose, 1 Moody & R. 100; Treadwell *v.* Moore, 34 Me. 112.

[3] Pickett *v.* Memphis Bank, 32 Ark. 346; Tayloe *v.* Sandiford, 7 Wheat. 14; Robert *v.* Garnie, 3 Caines, 14; Scott *v.* Fisher, 4 T. B. Mon. 387; Newmarch *v.* Clay, 14 East, 239; Shaw *v.* Picton, 4 B. & C. 715; Mitchell *v.* Dall, 2 Harr. & G. 159; 4 Gill & J. 361; Fowke *v.* Bowie, 4 Harr. & J. 566; West Branch Bank *v.* Moorehead, 5 Watts & S. 542; Stone *v.* Seymour, 15 Wend. 19.

[4] Reed *v.* Boardman, 20 Pick. 441; Wetherell *v.* Joy, 40 Me. 325.

[5] Lash *v.* Edgerton, 13 Minn. 210. Held otherwise, if payment is made before maturity. Starr *v.* Richmond, 30 Ill. 276. If the interest also bears interest, then the payment must be applied to the interest on

Everything else being equal, the law will apply the payment to the debts of longest standing.[1] Ordinarily, the payment will be applied to those debts which, on account of bearing interest, or of some penalty or criminal liability being attached to it, is most burdensome to the debtor.[2] But it will not be applied to the debt which is secured, in preference to the unsecured debt. In this case the best interest of the creditor is consulted, and payment is applied to the unsecured debt.[3] But the general rule is that the law favors the surety, and will apply the payment to the debt on which the surety is liable,[4] that is, of course, if the creditor has not made the application. The creditor has the right, if he chooses, to apply the payment to the unsecured debt, against the interest of the surety.[5] The court will not apply it to a debt barred by the statute of limitations, in preference to one that is not barred.[6] But if one of two

interest, then to the primary interest, and, finally, to the principal. Auketel *v.* Converse, 17 Ohio St. 11.

[1] United States *v.* Kirkpatrick, 9 Wheat. 720; Smith *v.* Loyd, 11 Leigh, 512; Horne *v.* Planters' Bank, 32 Ga. 1; Mills *v.* Fowlkes, 5 Bing. N. C. 461; Bobe *v.* Stickney, 36 Ala. 482; Wendt *v.* Ross, 33 Cal. 650.

[2] Meggot *v.* Mills, 1 Ld. Raym. 286; Spiller *v.* Creditors, 16 La. Ann. 292; Wright *v.* Laing, 3 B. & C. 165; Peters *v.* Anderson, 5 Taunt. 596. But see Mills *v.* Fowlkes, 5 Bing. N. C. 455; 7 Scott, 444; Stone *v.* Seymour, 15 Wend. 29.

[3] Lash *v.* Edgerton, 13 Minn. 210; Foster *v.* McGraw, 64 Pa. St. 464; Baine *v.* Williams, 10 Sm. & M. 113; Standford Bank *v.* Benedict, 15 Conn. 437; Cole *v.* Withers, 33 Gratt. 204; Moss *v.* Adams, 4 Ired. Eq. 42; Field *v.* Holland, 6 Cranch, 8; Burch *v.* Tebbutt, 2 Stark. 74; Trullinger *v.* Kofold, 7 Ore. 228; Anon., 8 Mod. 235; Chitty *v.* Naish, 2 Dowl. 511; Planters' Bank *v.* Stockman, 1 Freem. Ch. 502; Hilton *v.* Burley, 2 N. H. 193; Jones *v.* Kilgore, 2 Rich. Eq. 64; Moss *v.* Adams, 4 Ired. Eq. 42; Ransour *v.* Thomas, 10 Ired. 165. See *contra* Pattison *v.* Hall, 9 Cow. 747. See also Dorsey *v.* Gassaway, 2 Harr. & J. 402; Guinn *v.* Whitaker, 1 Harr. & J. 754; Robinson *v.* Doolittle, 12 Vt. 246.

[4] Marryatts *v.* White, 2 Stark. 101. See Kirby *v.* Duke of Marlborough, 2 M. & S. 18; Pierce *v.* Knight, 31 Vt. 701; Hausen *v.* Rounsavell, 74 Ill. 238; Fridley *v.* Bowen, 103 Ill. 633.

[5] Harding *v.* Tifft, 75 N. Y. 461; Hanford *v.* Robertson, 47 Mich. 100.

[6] Nash *v.* Hodgson, 6 De. G. M. & G. 474.

or more debts falls under the bar of the statute after payment and before its appropriation, the court will apply it to the debt that has thus been barred.[1] And where the sum paid equals the amount due on one item, it will be applied to that item.[2]

If one is indebted, individually and as a partner, to the same person, a payment will be applied to the individual or partnership debt, according as the money paid belongs to the individual partner[3] or to the firm.[4] If it is doubtful whose money is paid, in the case of individual and joint liabilities, the creditor may apply it to either debt.[5] And where there is a change in the *personnel* of the firm in the midst of a series of commercial transactions with a particular creditor, the court should apply a payment to the debts of the old firm.[6]

§ 378. **Payment supra protest, or for honor.** — It is the general rule, already stated,[7] that no one but a party to the paper can make or tender payment, without the consent of the holder. But an exception to the rule is to be found in the case of payment *supra protest*, or for the honor of some party or parties to the paper. This can only be done after protest for non-payment or non-acceptance by the acceptor.[8] The person wishing to pay for the honor of some one or more of the parties, must be ready, on the day of maturity, and offer to pay the money to the notary

[1] Robinson's Admr. *v.* Allison, 36 Ala. 525.

[2] Robert *v.* Garnie, 3 Caines, 14.

[3] Fairchild *v.* Holly, 10 Conn. 175.

[4] Thompson *v.* Brown, Moody & M. 40.

[5] Van Rensselaer's Exrs. *v.* Roberts, 5 Den. 570; Baker *v.* Stackpole, 9 Cow. 420.

[6] Simon *v.* Ingham, 5 B. & C. 72; 3 Dowl. & R. 249; Hooper *v.* Keay, 2 Q. B. Div. 178.

[7] See *ante*, § 372.

[8] Vandewall *v.* Tyrrell, 1 Moody & M. 87; Chitty on Bills [*508, 509], 575.

public, after he has noted it for protest; and he must go before the notary and declare that he makes payment for certain parties, naming them.[1] And he must, within a reasonable time, notify the party or parties for whose honor he has made payment.[2]

The party so paying becomes subrogated to all the rights of the party or parties, for whose honor he pays, and can recover the amount of any party who, as prior indorser or drawer, is liable to such party or parties.[3] But he can not sue any subsequent indorser.[4] In order that he may recover the amount of any of the parties, he should pay for the honor of the bill in general, which is in effect a payment in honor of the last indorsee, and gives to the party paying the right of action against all the indorsers, as well as the drawer and acceptor.[5]

Even the drawee may make payment for the honor of one of the parties to the bill, if he has not himself become a party to it by acceptance.[6]

The right to make payment for honor is an incident of bills of exchange, designed to facilitate exchange, and does not extend to promissory notes.[7]

If the signature of the person for whose honor the payment is made is a forgery, the party paying, of course, has no remedy against the parties to the bill; nor can he recover back the money so paid unless he discovers the mistake in

[1] Chitty on Bills [*509], 575, 576; Geralopulo *v.* Wieler, 10 C. B. (70 Eng. C. L. R.) 690; Denston *v.* Henderson, 13 Johns. 322; Vandewall *v.* Tyrrell, 1 Moody & M. 87.

[2] Woods *v.* Pugh, 7 Ham. 164.

[3] Chitty on Bills [*509], 576.

[4] Mertens *v.* Withington, 1 Esp. 112.

[5] Fairley *v.* Roch, Lutw. 891; Chitty on Bills [*509], 576, 577; Cox *v.* Earle, 3 B. & Ald. 430; Vandewall *v.* Tyrrell, Moody & M. 87; Smith *v.* Nissen, 1 T. R. 269.

[6] Chitty on Bills [*508], 575.

[7] Smith *v.* Sawyer, 55 Me. 141: Story on Notes, § 453; Byles on Bills.

time to enable the holder to notify all parties to the bill of the dishonor, according to the requirements of the law of notice; in other words, he must discover it and notify the holder on the day of payment.[1]

§ 379. **Payment by note or bill, when absolute or conditional.** — This has been a much mooted question in the courts, and, as is usual when the reasons for the opposing theories are themselves doubtful, the courts are found to have rendered contradictory decisions. A terse statement will be given of the various conclusions reached, but if it is at all possible to formulate a rule that will approximately reconcile the otherwise conflicting decisions, it would be that a private bill or note, — excluding bank-notes and government treasury notes which are currency and pass as and for money,— when given in payment of a debt, does not constitute an absolute payment, until it itself has been paid, unless the parties have expressly or impliedly agreed that the note or bill shall be taken in absolute satisfaction of the debt; and this is true, whether the bill or note is given in payment of a debt of a different character, such as an open account, or a judgment, or of the same character. But the decisions will be found at times to run counter to this rule.

It has thus been decided in most of the courts, that if the debtor gives his own note or bill in liquidation of the debt, it will be a conditional payment, whether the debt is precedent,[2] or contemporaneous, as where one's note is

[1] Wilkinson *v.* Johnson, 3 B. & C. 428; 5 Dow. & Ry. 403.

[2] Clark *v.* Young, 1 Cranch, 181; Bank of United States *v.* Daniel, 12 Pet. 32; Peters *v.* Beverley, 10 Pet. 532; Downey *v.* Hicks, 14 How. 240; The Kimball, 3 Wall. 45; Sheehy *v.* Mandeville, 6 Cranch, 253; McGuire *v.* Gadsby, 3 Call, 324; Middlesex *v.* Thomas, 5 C. E. Green, 39; Clopper *v.* Union Bank, 7 Har. & J. 120; McLaren *v.* Hall, 26 Iowa, 298; Miller *v.* Lumsden, 16 Ill. 161; Archibald *v.* Argall, 53 Ill. 307; Logan *v.* Attix, 7 Iowa, 77; Davis' Estate, 5 Whart. 537; Jones *v.* Strawhan, 4 Watts & S. 261; McIntyre *v.* Kennedy, 29 Pa. St. 448; Merrick *v.* Boury, 4 Ohio St.

given in immediate settlement of some purchase or other contract.[1]

Where a stranger's note or bill is transferred in satisfaction of a debt, the cases are still more at variance. Where such a note or bill is given for a precedent debt, it is very generally held to be only a conditional payment, whether the paper is payable to order and indorsed, or is

60; Sutliffe *v.* Atwood, 15 Ohio St. 186; Cole *v.* Sackett, 1 Hill, 516; Winsted Bank *v.* Webb, 39 N. Y. 325; Hawley *v.* Foote, 19 Wend. 516; Frisbie *v.* Larned, 21 Wend. 450; Smith *v.* Miller, 43 N. Y. 171; Board of Education *v.* Fonda, 77 N. Y. 350; McNiel *v.* McCamley, 6 Tex. 163; Marshall *v.* Marshall, 42 Ala. 149; Myatts *v.* Bell, 41 Ala. 222; Stam *v.* Kerr, 31 Miss. 199; Guion *v.* Doherty, 43 Miss. 538; Smith *v.* Owens, 21 Cal. 11; Poole *v.* Rice, 9 W. Va. 73; Feamster *v.* Withrow, 12 W. Va. 611; Walsh *v.* Lennon, 98 Ill. 27; Crawford *v.* Roberts, 50 Cal. 236; Brown *v.* Olmsted, 50 N. Y. 163; Wilbur *v.* Jernegan, 11 R. I. 113; Nightingale *v.* Chafee, 11 R. I. 609; McCluny *v.* Jackson, 6 Gratt. 96; Lewis *v.* Davison, 29 Gratt. 226; Armistead *v.* Ward, 2 Pat. & H. 515; Glenn *v.* Smith, 2 Gill & J. 512; Walton *v.* Bemiss, 16 La. 140; McLaren *v.* Hall, 26 Iowa, 298; Steamboat Charlotte *v.* Hammond, 9 Mo. 63; Yarnell *v.* Anderson, 14 Mo. 619; Doebling *v.* Loss, 40 Mo. 150; Dougal *v.* Cowles, 5 Day, 511; Burdick *v.* Green, 15 Johns. 249; Gordon *v.* Price, 10 Ired. 385; Union Bank *v.* Smiser, 1 Sneed, 501; Welch *v.* Allington, 23 Cal. 322; Breitung *v.* Lindauer, 37 Mich. 217; Smith *v.* Chester, 1 T. R. 655; Price *v.* Price, 16 M. & W. 232; Richardson *v.* Rickman, 5 T. R. 517. But in several of the States, it is held that the taking of a bill or note is presumptively an absolute payment, but parol evidence is admissible to rebut this presumption. Ely *v.* James, 123 Mass. 36; Parkham Sewing M. Co. *v.* Brock, 113 Mass. 194; Mehlberg *v.* Fischer, 24 Wis. 607; Gaskins *v.* Wells, 15 Ind. 253; Smith *v.* Bettger, 68 Ind. 254; Hutchins *v.* Olcutt, 4 Vt. 549; Torrey *v.* Baxter, 13 Vt. 452; Dickinson *v.* King, 28 Vt. 378; Farr *v.* Stephens, 26 Vt. 299; Varner *v.* Nobleborough, 2 Greenl. 124; Gilmore *v.* Bussey, 12 Me. 415; Gooding *v.* Morgan, 37 Me. 619; Ward *v.* Bourne, 56 Me. 161; Thatcher *v.* Dinsmore, 5 Mass. 302; Chapman *v.* Durant, 10 Mass. 51; Wood *v.* Bodwell, 12 Mass. 289; Dodge *v.* Emerson, 131 Mass. 467; Green *v.* Russell, 132 Mass. 536; Morrison *v.* Smith, 81 Ill. 221; Hoodless *v.* Reid, 112 Ill. 105; Tisdale *v.* Maxwell, 58 Ala. 40; Rowe *v.* Collier, 25 Tex. 252; Hunt *v.* Boyd, 2 La. 109.

[1] 2 Am. Lead. Cas. 263; Sheehy *v.* Mandeville, 6 Cranch, 253; Story on Notes, § 104. But see *contra* 2 Parsons' N. & B. 157, where Mr. Parsons pronounces the transaction "to be substantially selling a note by barter, or exchanging it for goods."

payable to bearer and unindorsed, by the debtor.[1] But where the note or bill of a stranger is given in satisfaction of a contemporaneous debt, it is held to be an absolute payment, if it is payable to bearer and is transferred without indorsement,[2] and a conditional payment, if it is payable to order and is transferred by indorsement; the reason for this distinction being that the conditional liability of an indorser is inconsistent with the presumption of an absolute payment.[3]

So, also, where a new note or bill is given in renewal of an old one, and the original is retained by the payee, the new instrument only operates as a suspension of the payee's rights in the original, and does not constitute an absolute payment of the original until it itself is paid.[4] Where the

[1] Camidge *v.* Allenby, 6 B. & C. 373; Wart *v.* Woolley, 3 B. & C. 439; *s. c.* 5 Dow. & R. 374; Swinyard *v.* Boyes, 5 M. & S. 62; Ex parte Blackburne, 10 Ves. 204; Leaugue *v.* Wasinn, 85 Pa. St. 244; M'Lughan *v.* Bovard, 4 Watts, 315; Downey *v.* Hicks, 14 How. 249; Crane *v.* McDonald, 45 Barb. 355; Gibson *v.* Tobey, 53 Barb. 195; Noel *v.* Murray, 3 Kern. 169; 1 Duer, 388; Gordon *v.* Price, 10 Ired. L. 388; Gallagher *v.* Roberts, 2 Wash. C. C. 193. But see *contra* Dennis *v.* Williams, 40 Ala. 633. In Stain *v.* Ker, 31 Miss. 199; Soffe *v.* Gallagher, 3 E. D. Smith, 507, held to be absolute payment, where it is transferred with indorsement. *Contra* Cook *v.* Beech, 10 Humph. 413.

[2] Breed *v.* Cook, 15 Johns. 242; Bank of England *v.* Newman, 1 Ld. Raym. 442; Ex parte Blackburne, 10 Ves. 204; Fydell *v.* Clarke, 1 Esp. 447; Tobey *v.* Barber, 5 Johns. 68; Gibson *v.* Tobey, 53 Barb. 195; Whitbeck *v.* Vanners, 11 Johns. 409; Noel *v.* Murray, 1 Duer, 388; Camidge *v.* Allenby, 6 B. & C. 373; 2 Parsons' N. & B. 156, 183. But presumption may be rebutted by parol evidence. Torrey *v.* Hadley, 27 Barb. 196; Porter *v.* Talcott, 1 Cow. 381; Rew *v.* Barber, 3 Cow. 279; Gordon *v.* Price, 10 Ired. L. 388.

[3] Monroe *v.* Huff, 5 Den. 369; Soffe *v.* Gallagher, 3 E. D. Smith, 507; Boyd *v.* Hitchcock, 20 Johns. 76; Shriner *v.* Keller, 25 Pa. St. 61; 2 Am. Lead Cas. 263; 2 Parsons' N. & B. 159.

[4] Kendrick *v.* Lomax, 2 C. & J. 405; Cumber *v.* Wane, 1 Stra. 426; Bishop *v.* Rowe, 3 M. & S. 362; Woods *v.* Woods, 127 Mass. 141; East River Bank *v.* Butterworth, 45 Barb. 476; Waydell *v.* Luer, 5 Hill, 448; Cole *v.* Sackett, 1 Hill, 516; Gregory *v.* Thomas, 20 Wend. 17; Hobson *v.* Davidson, 8 Mart. (La.) 431. But see *contra* where the old note is

old note or bill is surrendered, it is evidence tending to prove an intention to merge the old note in the new, yet the authorities are divided upon the question, whether it does, in fact and alone, prove the merger, some of the authorities maintaining that it does not,[1] and others, that it does.[2]

In every case, where the new note or bill proves to be void, on account of forgery or alteration, the liability on the old instrument still stands or revives, according to the view taken of the effect of the renewal.[3]

§ 380. **Presumptions in respect to absolute and conditional payment, how rebutted.** — It has been already intimated that the presumption of law, in respect to the character of the payment, when it is made by a note or

held to be merged in the new one. Slaymaker *v.* Gundacker, 10 S. & R. 75; Nichol *v.* Bate, 10 Yerg. 429; Hill *v.* Bostick, 10 Humph. 410; Bank of Commonwealth *v.* Letcher, 3 J. J. Marsh. 195, But the parties may always expressly agree that the old note be merged in the liability of the new. Crockett *v.* Trotter, 1 Stew. & P. 446; Weakly *v.* Bell, 9 Watts, 273; Morris *v.* Harvey, 75 Va. 726.

[1] Olcott *v.* Rathbone, 5 Wend. 490; Jagger Iron Co. *v.* Walker, 76 N. Y. 522; Parrott *v.* Colby, 71 N. Y. 597, overruling Fisher *v.* Marvin, 47 Barb. 159. Even when the new note has been reduced to judgment, as long as there has been no satisfaction. First Nat. Bank *v.* Morgan, 13 N. Y. S. C. (6 Hun) 348; Cole *v.* Sackett, 1 Hill, 516; Elwood *v.* Deidendorf, 5 Barb. 398; Pratt *v.* Foote, 12 Barb. 212, 213; Farrington *v.* Frankfort Bank, 24 Barb. 562; Olcott *v.* Rathbone, 5 Wend. 490; Corn Exchange Ins. Co. *v.* Babcock, 57 Barb. 231; Davis *v.* Anable, 2 Hill, 339; Bates *v.* Rosekrans, 37 N. Y. 409; Winsted Bank *v.* Webb, 39 N. Y. 325.

[2] Smith *v.* Harper, 5 Cal. 329; Morgan *v.* Creditors, 1 La. 527, Morris *v.* Harvey, 75 Va. 726. In New York it was held lately that a renewal in a bank is by common banking custom treated as an extinguishment of the old note, and that the same effect to it should be given by the law. Phœnix Ins. Co. *v.* Church, 81 N. Y. 226.

[3] Watkins *v.* Hill, 8 Pick. 522; Ritter *v.* Singmaster, 73 Pa. St. 400; Goodrich *v.* Tracey, 43 Vt. 314; Sloman *v.* Cox, 1 C. M. & R. 471. See Pomeroy *v.* Rice, 16 Pick. 22; Taft *v.* Boyd, 13 Allen, 84; Dodge *v.* Emerson, 131 Mass. 467.

bill, is not conclusive, but may be rebutted by proof of a contrary intention, whether the presumption was in favor of its absolute or conditional character. In some of the cases it has been held that the presumption could be rebutted by proof of an express agreement to the contrary, especially to rebut the presumption of a conditional payment.[1] But the better opinion is that the agreement may be implied from the surrounding circumstances.[2] As a rule, however, the mere acknowledgment of payment in full, or of payment in general, could not be sufficient to rebut the presumption of conditional payment without the aid of corroborating circumstances.[3] But it has been held that the words "received and accepted in satisfaction," coupled with the giving of security in the shape of an indorsement by a third person, will establish the presumption of an absolute payment.[4] The mere surrender of a

[1] Muldon *v.* Whitlock, 1 Cow. 290; Hays *v.* Stone, 7 Hill, 128; Dougal *v.* Cowles, 5 Day, 511 Glenn *v.* Smith, 2 Gill of J. 493; Conkling *v.* King, 10 Barb. 372. See Booth *v.* Smith, 3 Wend. 66; Boyd *v.* Hitchcock, 20 Johns. 76; Butts *v.* Dean, 2 Met. 76; Appleton *v.* Parker, 15 Gray, 173; Follette *v.* Steele, 16 Vt. 30; Thompson *v.* Wilson, 27 Ind. 370; Comstock *v.* Smith, 22 Me. 262; Shumway *v.* Reid, 34 Me. 560; Iowa Co. *v.* Foster, 49 Iowa, 676.

[2] Miller *v.* Lumsden, 16 Ill. 161; Gordon *v.* Price, 10 Ired. 385; Hart *v.* Boller, 15 Serg. & R. 162; Johnson *v.* Cleaves, 15 N. H. 332; Merrick *v.* Boury, 4 Ohio St. 60; Tulford *v.* Johnson, 15 Ala. 384; Berry *v.* Griffin, 10 Md. 27; Slocumb *v.* Holmes, 1 How. (Miss.) 139; White *v.* Howard, 1 Sandf. 81; Harris *v.* Lindsay, 4 Wash. C. C. 98, 271.

[3] Maillard *v.* Duke of Argyle, 6 Man. & G. 40; Muldon *v.* Whitlock, 1 Cow. 290; Putnam *v.* Lewis, 8 Johns. 389; Tobey *v.* Barber, 5 Johns. 68; McLughan *v.* Bovard, 4 Watts, 308; Hotchin *v.* Secor, 8 Mich. 494; Dudgeon *v.* Haggart, 17 Mich. 273; Burchard *v.* Frazer, 23 Mich. 228; Berry *v.* Griffin, 10 Md. 27; Glenn *v.* Smith, 2 Gill & J. 494; Steamboat Charlotte *v.* Hammond, 9 Mo. 58; Gardner *v.* Gorham, 1 Dougl. (Mich.) 507; Feamster *v.* Withrow, 12 W. Va. 651; Maze *v.* Miller, 1 Wash. C. C. 328. But see *contra* Barron *v.* How, 13 Mart. (La.) 144. A receipt "in full when paid," can only mean conditional payment. Dayton *v.* Trull, 23 Wend. 345.

[4] Morris *v.* Harvey, 75 Va. 726.

security is not sufficient.[1] If a creditor accepts the bill of a third person in payment, when he had the option of taking cash it is held to be an absolute payment, and the original debtor is discharged.[2] But it is only a conditional payment if the creditor has not the option of taking cash.[3]

As a matter of course, any fraudulent misrepresentation of material facts, in making payments with bills and notes, will render the transaction entirely void, and revive the rights and liabilities of the parties on the original debt.[4]

§ 381. **Right of action suspended by taking bill or note in payment of debt.** — Although it is generally held that the acceptance of a bill or note, in satisfaction of a debt, constitutes only conditional payment, it suspends all right of maintaining actions on the original debt, as long as the note or bill given in payment is not matured; the object of the suspension being the prevention of the maintenance of separate actions upon both debts, and a recovery on both, in case the note or bill should be negotiated before maturity.[5] When the note or bill falls due, the right of action is re-

[1] Butts *v.* Dean, 2 Met. 76; Pomeroy *v.* Rice, 16 Pick. 22; Fowler *v.* Ludwig, 34 Me. 455.

[2] Strong *v.* Hart, 6 B. & C. (13 C. C. L. R.) 160.

[3] Marsh *v.* Pedder, 4 Camp. 257; Taylor *v.* Briggs, M. & M. 28; Robinson *v.* Read, 9 B. & C. (17 E. C. L. R.) 444; Swinyard *v.* Bowes, 5 M. & S. 62.

[4] Hawse *v.* Crowe, 1 R. & M. 414; Bayard *v.* Shunk, 1 Watts & S. 94; Lowrey *v.* Murrell, 2 Port. 280; Long *v.* Sprull, 7 Jones L. 96; Gurney *v.* Womersley, 4 E. & B. (82 Eng. C. L. R.) 133; Popley *v.* Ashlin, 6 Mod. 147; Holt, 121; Bridge *v.* Batchelder, 9 Allen, 394; Pierce *v.* Drake, 15 Johns. 475; Martin *v.* Pennock, 2 Barr, 376; Brown *v.* Montgomery, 20 N. Y. 287; Delaware Bank *v.* Jarvis, 20 N. Y. 226; Fenn *v.* Harrison, 3 T. R. 759; Roget *v.* Merrill, 2 Cal. 117.

[5] Black *v.* Zacharie, 3 How. 483; Putnam *v.* Lewis, 8 Johns. 389; Stedman *v.* Gooch, 1 Esp. 3; Griffith *v.* Owen, 13 M. & W. 58; Price *v.* Price, 16 M. & W. 231; Armistead *v.* Ward, 2 Pat. & H. 504; Van Epps *v.* Dillaye, 5 Barb. 244; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; Kearslake *v.* Morgan, 5 T. R. 513; Maier *v.* Canovan, 57 How. Pr. 504.

vived, and the creditor has the right to elect on which liability to bring suit.[1] But if he brings suit on the original debt, he must either produce in court and surrender the note or bill given in payment of the debt sued on, or satisfactorily account for its absence, in order to protect the debtor against a negotiation of the note or bill before maturity, and a consequent liability upon it to some innocent purchaser.[2]

In order that the taking of the bill or note may operate as a suspension of the right of action on the original debt, the entire agreement in respect to the satisfaction of the debt must have been complied with. If the agreement is in part unperformed, as where the agreement was to give a note for the debt, and to pay the costs of a suit begun on the original debt, the failure to pay the costs would enable the creditor to proceed with his suit.[3] Nor will there be any suspension of the right of action on the original debt, where it was under seal, and the new obligation was not under seal.[4] Nor will the taking of a note or bill for rent due prevent the lessor from proceeding with his remedy of distress.[5]

[1] Owenson *v.* Morse, 7 T. R. 50; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 426; Stedman *v.* Gooch, 1 Esp. 4; Tobey *v.* Barber, 5 Johns. 68; Price *v.* Price, 16 M. & W. 231.

[2] Cole *v.* Sackett, 1 Hill, 516; Tobey *v.* Barber, 5 Johns. 66; Alcock *v.* Hopkins, 6 Cush. 484; Miller *v.* Lumsden, 16 Ill. 161; Jones *v.* Savage, 6 Wend. 658; Dayton *v.* Trull, 23 Wend. 345; Smith *v.* Lockwood, 10 Johns. 367; Raymond *v.* Merchant, 3 Cow. 150; Lazier *v.* Nevin, 3 Hagans (W. Va.), 622; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 427; Matthews *v.* Dare, 20 Md. 248; Hays *v.* McClurg, 4 Watts, 452; Harris *v.* Johnston, 3 Cranch, 311.

[3] Putnam *v.* Lewis, 8 Johns. 389. The same conclusion was reached, notwithstanding the new note had been negotiated. Norris *v.* Aylette, 2 Camp. 328. Of course payment of the new note or bill would satisfy the debt itself. Dillon *v.* Rimmer, 1 Bing. 100.

[4] Drake *v.* Mitchell, 3 East, 251; Curtis *v.* Rush, 2 Ves. & B. 416.

[5] Brown *v.* Gillman, 4 Wheat. 256; Harris *v.* Shipway, Buller N. P. 182; 2 Parsons' N. & B. 164; Davis *v.* Gyde, 2 A. & E. 623; 4 N. & M. 462; Chipman *v.* Martin, 13 Johns. 241; Palfrey *v.* Baker, 3 Price, 572.

§ 382. **Duties of holder of bill or note taken in payment.** — Wherever a bill or note is given in payment of a debt, whether precedent or contemporaneous, and the debtor becomes liable on such a bill or note as a drawer or indorser, the failure to exercise due diligence in the presentment for payment, and the giving notice of dishonor, will, according to the weight of authority, not only discharge the debtor of his liability as drawer or indorser, but, also, of his liability on the original debt.[1] But there are some authorities which maintain that the debtor should not be discharged of his liability on the original debt, unless he has suffered an actual loss in consequence of the laches of the creditor in respect to presentment and notice;[2] applying to that case the same rule which determines the liability of the debtor, when the bill or note is payable to bearer, and is transferred by delivery and without indorsement. In every such case the liability on the original debt is extinguished only when some loss occurs from the negligence of the creditor in presenting the bill or note for payment, and in giving notice of dishonor.[3]

[1] Mauney *v.* Coit, 80 N. C. 300; Berry *v.* Bridges, 3 Taunt. 130; Dayton *v.* Trull, 23 Wend. 345; Smith *v.* Miller, 43 N. Y. 171; *s. c.* 52 N. Y. 546; Betterton *v.* Roope, 3 Lea (Tenn.), 220; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501; Blanchard *v.* Tittavawassee Boom Co., 40 Mich. 566; Mehlberg *v.* Fisher, 24 Wis. 607; Allan *v.* Eldred, 50 Wis. 136; Middlesex *v.* Thomas, 5 C. E. Green, 39; Booth *v.* Smith, 3 Wend. 66; Jennison *v.* Parker, 7 Mich. 355; Tobey *v.* Barber, 5 Johns. 68; Peacock *v.* Purcell, 14 C. B. (N. S.) 728; Huston *v.* Weber, 3 T. & C. 147; 7 Hun, 120. The same conclusion is reached, where the note or bill is transferred as security instead of in payment of the original debt. Peacock *v.* Purcell, *supra;* Betterton *v.* Roope, *supra;* Haines *v.* Pearce, 41 Md. 221; Lawrence *v.* McCalmont, 2 How. 426; Lee *v.* Baldwin, 10 Ga. 208; Roberts *v.* Thompson, 14 Ohio, 1; Hamilton *v.* Cunningham, 2 Brock. 350.

[2] Kephart *v.* Butcher, 17 Iowa, 240; Gallagher's Exrs. *v.* Roberts, 2 Wash. C. C. 191; 2 Am. Lead. Cas. 259, 260. See Brooks *v.* Elgin, 6 Gill, 254; Hamilton *v.* Cunningham, 2 Brock. 350; Cook *v.* Buck. 10 Humph. 412.

[3] Story on Bills, § 109; Story on Notes, § 117; Dayton *v.* Trull, 23 Wend. 345; Tobey *v.* Barber, 5 Johns. 68. The burden of proof is on the defendant to show the laches and the damage flowing from the same. Bishop *v.* Rowe, 3 M. & Sel. 362; Goodwin *v.* Coates, 1 M. & R. 221.

CHAPTER XX.

FORGERY AND ALTERATION OF COMMERCIAL PAPER.

SECTION 391. Definition and nature of forgery.
392. Forgery, alteration and spoliation distinguished.
393. Presumption as to time of alteration and burden of proof.
394. What are material alterations.
395. What are immaterial alterations — Correction of mistakes.
396. The effect of authorized alterations.
397. Rights of *bona fide* holder of altered bill or note.
398. Effect of adoption of a forged signature as one's own.
399. When one is estopped from denying the genuineness of another's signature.
400. Recovery of money paid on forged instruments.

§ 391. **Definition and nature of forgery.** — Forgery is the counterfeit making or fraudulent alteration of any writing; and, although the more common kind of forgery is the signing of another's name, it is just as much a forgery, if one should write over the genuine signature of another, what he was not authorized to write, and representing fraudulently a liability as a party to a commercial instrument, which does not exist.[1] Even the negotiation of a paper, with a genuine signature, but with the fraudulent representation that it is the obligation of another person of the same name, is held to be a forgery;[2] and *a fortiori*, where some false description of the occupation or residence of another person of the same name has been affixed to the otherwise genuine signature.[3]

[1] Rex *v.* Hales, 17 State Trials, 161; Powell *v.* Commonwealth, 11 Gratt. 822.

[2] Rex *v.* Parke, 2 Leach Cr. Law, 614; Commonwealth *v.* Foster, 114 Mass. 311. But see Chitty on Bills, [*780].

[3] Rex *v.* Webb, Russ. & R. C. C. 72; Rex *v.* Rogers, 8 C. & P. 629; Rex *v.* Parke, 2 Leach, 775; Mead *v.* Young, 4 T. R. 28.

The signature of a fictitious name is also a forgery, if made with intent to defraud.[1]

The "utterance" or transfer of the falsely executed instrument constitutes the gist of the offense, and without such utterance there is no crime of forgery. A mere display of the counterfeit paper, or its delivery to another, without any intention to pass it, does not constitute an act of forgery.[2] But any delivery, for the purpose of a fraudulent transfer, even to a confederate in the crime, completes the crime.[3]

§ 392. **Forgery, alteration and spoliation distinguished.** — Intent to defraud is an essential element of forgery; and in order that an alteration of a negotiable instrument may amount to a forgery, it must be done fraudulently. It is as much forgery, as the making of the instrument outright.[4] These fraudulent alterations not only avoid the instrument itself, but also extinguish the debt, which constitutes the consideration of the instrument.[5]

If the alterations are innocently made, they do not constitute forgeries; but if they are material, they will nevertheless avoid the instrument, although the action may be

[1] Lockett's Case, 1 Leach, 94; Taft's Case, 1 Leach, 172; Commonwealth *v.* Chandler, Thatch. Crim. Cas. 187; Chitty on Bills, [*782]; State *v.* Givens, 5 Ala. 747; Brown *v.* People, 8 Hun, 562; Rex *v.* Ballard, 1 Leach, 97; Rex *v.* Dunn, 1 Leach, 68; Schultz *v.* Astley, 2 Bing. N. C. 544; Rex *v.* Whiley, R. & R. 67; Gibson *v.* Minet, 1 H. Bl. 569, 583.

[2] Rex *v.* Shukard, Russ. & R. 200.

[3] Rex *v.* Palmer, Russ. & R. C. C. 72. Transfer without indorsement of a forged note payable to forger's order is an uttering of the counterfeit. Rex *v.* Beckett, Russ. & R. 86; Rex *v.* Post, Russ. & R. 101.

[4] Wheelock *v.* Freeman, 13 Pick. 165; Belknap *v.* National Bank, 100 Mass. 379; Rex *v.* Treble, 2 Taunt. 328; Rex *v.* Post, Russ. & Ry. 101; Rex *v.* Atkinson, 7 Car. & P. 669.

[5] Wheelock *v.* Freeman, 13 Pick. 165; Newell *v.* Mayberry, 3 Leigh, 254; Merrick *v.* Boury, 4 Ohio St. 70; Smith *v.* Mace, 44 N. H. 553; Wallace *v.* Harmstad, 44 Pa. St. 492; Clute *v.* Small, 17 Wend. 238; Meyer *v.* Huncke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 31.

maintained on the consideration of the instrument. At least this is the ruling of some of the English and American cases,[1] although the contrary view is maintained by some of the authorities.[2] But the authorities are unanimous in holding that any material alteration avoids the instrument itself, and prevents the maintenance of any action upon it.[3] But, as long as no one has been materially injured by the innocent alteration, it is not without the power of a court of equity to decree a restoration of the instrument to its original condition, and thus enable suit to be maintained on it.[4] Whether a material alteration will be presumed to be fraudulent, has been decided both in the affirmative[5] and in the negative;[6] while it is also held to depend upon the facts of each case what is the prevalent presumption, the presumptions shifting with slight variations of the facts.[7] It

[1] Atkinson *v.* Hawden, 2 Ad. & E. (29 E. C. L. R.) 169; Warren *v.* Layton, 3 Harring. 404; Clough *v.* Seay, 49 Iowa, 111; Hunt *v.* Gray, 35 N. J. L. 227; Clute *v.* Small, 17 Wend. 238; Meyer *v.* Hunecke, 55 N. Y. 412; Booth *v.* Powers, 56 N. Y. 31; Vogle *v.* Ripper, 34 Ill. 100; Sloman *v.* Cox, 1 C. M. & R. 471; Matteson *v.* Ellsworth, 33 Wis. 488; State Sav. Bank *v.* Shaffer, 9 Neb. 7. But if any one's remedy is impaired by the alteration, he cannot be sued on the debt or consideration. Alderson *v.* Langdale, 3 Barn. & Ad. 660.

[2] Bigelow *v.* Stephens, 35 Vt. 525; Gillette *v.* Smith, 18 Hun, 10; Martendale *v.* Follett, 1 N. H. 99. See Toomer *v.* Rutland, 57 Ala. 379.

[3] State Sav. Bank *v.* Shaffer, 9 Neb. 1; Angle *v.* N. W., etc., Ins. Co., 92 U. S. 342; Booth *v.* Powers, 36 N. Y. 31; Harsh *v.* Klepper, 20 Ohio St. 200; Evans *v.* Foreman, 60 Mo. 449; Moore *v.* Hutchinson, 69 Mo. 429.

[4] Chadwick *v.* Eastman, 53 Me. 16; 2 Parsons' N. &. B. 570; Kountz *v.* Kennedy, 63 Pa. St. 187; Collins *v.* Makepiece, 13 Ind. 448; Nevins *v.* DeGrand, 15 Mass. 436; Horst *v.* Wagner, 43 Iowa, 373; Rogers *v.* Shaw, 59 Cal. 260. See Shepard *v.* Whetstone, 51 Iowa, 457; Ames *v.* Brown, 22 Minn. 257. But there can be no restoration where the alteration was fraudulent. Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110.

[5] Whitmer *v.* Frye, 10 Mo. 349; Robinson *v.* Reed, 46 Iowa, 221; Wheelock *v.* Freeman, 13 Pick. 165.

[6] Gist *v.* Evans, 30 Ark. 286; Vogle *v.* Ripper, 34 Ill. 100.

[7] Kountz *v.* Kennedy, 63 Pa. St. 190· Craighead *v.* McLoney, 99 Pa. St. 211.

has also been held[1] and likewise doubted,[2] that a fraudulent alteration avoids the instrument, whether it be material or not.

If any change is made in the terms of a paper by a stranger to it, the act is called by some of the authorities a spoliation, and not an alteration. And while the English and Scotch cases do not recognize any difference in the effect of an alteration and spoliation, holding that every such material act, whether committed by a stranger or by a party to the paper, avoids it;[3] in the United States the more liberal rule prevails that a spoliation has no effect upon the liability of the parties to the instrument, so long as the original words remain legible, and free from doubt.[4]

§ 393. **Presumption as to time of alteration and burden of proof.**—Where the alteration is so well done, that it does not appear on the face of the instrument, the burden of proof is on the party alleging the alteration;[5] and the law presumes it to have been made contemporaneously with the execution of the instrument.[6]

[1] 1 Greenl. on Evidence, 568; Lubbering *v.* Kohlbrecher, 22 Mo. 598; Turner *v.* Billagram, 2 Cal. 523.

[2] Moge *v.* Herndon, 30 Miss. 120 ("an immaterial alteration may be treated as no alteration").

[3] Master *v.* Miller, 4 T. R. 320; 2 H. Bl. 140; Davidson *v.* Cooper, 11 M. & W. 778; 13 M. & W. 243; Murchie *v.* Macfarlane, cited in Thomson on Bills, 110.

[4] Crockett *v.* Thomason, 5 Sneed, 342; Terry *v.* Hazlewood, 1 Duvall 101; Ford *v.* Ford, 17 Pick. 418; Waring *v.* Smith, 2 Barb. Ch. 119; Vogle *v.* Ripper, 34 Ill. 106; Laugenberger *v.* Kroeger, 48 Cal. 147; United States *v.* Spalding, 2 Mason, 478; Piersol *v.* Grimes, 30 Ind. 129; Bigelow *v.* Stephen, 35 Vt. 521; Medlin *v.* Platte & Co., 8 Mo. 235; Lubbering *v.* Kohlbrecher, 22 Mo. 596; Cochran *v.* Nebeker, 48 Ind. 459; Buckler *v.* Huff, 53 Ind. 474; Lee *v.* Alexander, 9 B. Mon. 25; Blakey *v.* Johnson, 13 Bush, 197; Davis *v.* Carlisle, 5 Ala. 707; Union Nat. Bank *v.* Roberts, 45 Wis. 373.

[5] Meckel *v.* State Sav. Inst., 36 Ind. 357.

[6] Brooke *v.* Smith, Mor. 679. But see *contra* Emerson *v.* Murray, 4 N. H. 171.

If the alteration is apparent on the face, we find the authorities giving contrary rulings, and some of the courts are disposed to hold that "it is impossible to fix a cast-iron rule to control in all cases," and that the conclusion in each case must depend upon the surrounding circumstances and the facts of each case; a question of fact, therefore, for the jury.[1]

Some of the cases hold that the alteration is presumed in any case to have been made at the time of execution of the instrument; at any rate, they throw the burden of proof on the defendant.[2] But the preponderance of authority casts

[1] Neil *v.* Case, 25 Kan. 510 (37 Am. Rep. 259), Horton, C. J., saying: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated. *First.* That an alteration on the face of the writing raises no presumption either way, but the question is for the jury. *Second.* That it raises a presumption against the writing, and requires therefore some explanation to render it admissible. *Third.* That it raises such a presumption when it is suspicious, otherwise not. *Fourth.* That it is presumed in the absence of explanation to have been made before delivery, and therefore requires no explanation in the first instance * * * Generally the instrument should be given in evidence, and in a jury case should go to the jury upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before, or at the time of, the execution of the instrument. Perhaps there might be cases when the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not of that character." See, in support the text, Admrs. of Beaman *v.* Russell, 20 Vt. 210; Bailey *v.* Taylor, 11 Conn. 531; Kountz *v.* Kennedy, 63 Pa. St. 190; Davis *v.* Jenney, 1 Met. 221.

[2] Sedgwick *v.* Sedgwick, 5 Cal. 213; Gooch *v.* Bryant, 13 Me. 386; Stoner *v.* Ellis, 6 Ind. 161; Patterson *v.* Fagan, 38 Mo. 70; Smith *v.* Terry, 69 Mo. 142; Dodge *v.* Haskell, 69 Me. 429; Cochran *v.* Nebeker, 48 Ind. 459; Cumberland Bank *v.* Hall, 1 Halst. 215; Bailey *v.* Taylor, 11 Conn. 531; Davis *v.* Jenney, 1 Met. 221; Farnsworth *v.* Sharp, 4 Sneed, 55; Sayre *v.* Reynolds, 2 South. 737. See also Corcoran *v.* Dale, 32 Cal. 89; Wilson *v.* Harris, 35 Iowa, 507. In Paramore *v.* Lindsey, 63 Mo. 57, the court said: "If nothing appears to the contrary, the alteration will be

the burden of proof upon the plaintiff, and presumes the alteration to have been made after negotiation of the instrument, whenever the alteration is apparent on the face; on the ground that a prudent indorsee would not have taken the paper without inquiry, if the alteration had been made before its transfer to him; and at least it is incumbent on him to prove that it had been altered before he received it.[1]

§ 394. **What are material alterations.** — Any alteration is material which changes the liability of the parties in any way; and the alteration avoids the paper, whether it is favorable or unfavorable to the party making the alteration. The alteration in any such event affects the identity of the paper and avoids it.[2]

presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as the person by whom, and the interest with which the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence "

[1] "The very fact that he received it is presumptive evidence that it was unaltered at the time; and, to say the least, his folly or his knavery raised a suspicion which he ought to remove." Gibson, C. J., in Simpson *v.* Stockhouse, 9 Barr, 186. See to same effect, Hill, *v.* Barnes, 11 N. H. 395; Fontaine *v.* Gunter, 31 Ala. 258; White *v.* Haas, 32 Ala. 430; Daniel *v.* Daniel, Dudley 239; McMicker *v.* Beauchamp, 2 La. (O. S.) 290; Wilde *v.* Armsby, 6 Cush. 314; Runnion *v.* Crane, 4 Blackf. 466; Walters *v.* Short, 5 Gilm. 252; Piercy *v.* Piercy, 5 W. Va. 199; Henman *v.* Dickinson, 5 Bing. (15 E. C. L. R.) 183; Kennedy *v.* Lancaster Co. Bank, 18 Pa. St. 347; Heffner *v.* Wenrick, 32 Pa. St. 423; Wheat *v.* Arnold, 36 Ga. 480; Willett *v.* Shepard, 34 Mich. 106; Chism *v.* Toomer, 27 Ark. 109; Warren *v.* Layton, 3 Harr. 401; Elbert *v.* McClelland, 8 Bush, 577. But see Simpson *v.* Davis, 119 Mass. 269.

[2] Coburn *v.* Webb, 56 Ind. 100 (postponing the accrument of interest); Wood *v.* Steele, 6 Wall. 80 (prolonging the time of payment); to same effect, Lewis *v.* Kramer, 3 Md. 265; Miller *v.* Gilleland, 19 Pa. St. 119; Outhwaite *v.* Luntley, 4 Camp. 179; Bathe *v.* Taylor, 15 East, 412; Lesler *v.* Rogers, 18 B. Mon. 528. The lessening of the principal and interest,

The following are held to be material alterations: *First*, any change in the date of the instrument,[1] but not in the date of the indorsement.[2] *Secondly*, any change in the time of payment.[3] *Third*, any alteration in the amount of principal and interest.[4] *Fourth*, any alteration in the medium of payment, such as making it payable in gold or specie,[5] or in the denomination, as from pounds to dollars,

Stevens *v.* Graham, 7 S. & R. 505; Hewins *v.* Cargill, 67 Me. 554; Ætna Bank *v.* Winchester, 43 Conn. 391; State Sav. Bank *v.* Schaffer, 9 Neb. 7; Whitmer *v.* Frye, 10 Mo. 348; Moore *v.* Hutchinson, 69 Mo. 429.

[1] Master *v.* Miller, 4 T. R. 320; 2 H. Bl. 140; Britton *v.* Dierkes, 46 Mo. 592; Overton *v.* Mathews, 35 Ark. 147; Wood *v.* Steele, 6 Wall. 80; Walton *v.* Hastings, 4 Camp. 223; Outhwaite *v.* Luntley, 4 Camp. 179; Jacob *v.* Hart, 2 Stark. 45; Brown *v.* Straw, 6 Neb. 536; Owings *v.* Arnott, 33 Miss. 406. And this is true, although the actual time of payment has not been changed, in consequence of the day of maturity according to the original date being Sunday, and necessitating payment on the Saturday previous, which is the day of maturity after the change in the date. Stevens *v.* Graham, 7 Serg. & R. 505; 99 Pa. St. 211.

[2] Griffith *v.* Cox, 1 Tenn. 210.

[3] Miller *v.* Gilleland, 19 Pa. St. 119; Outhwaite *v.* Luntley, 4 Camp. 179; Bathe *v.* Taylor, 15 East, 412; Lesler *v.* Rogers, 18 B. Mon. 528; Wyman *v.* Yeomans, 84 Ill. 403; Murdoch *v.* Lee, 4 Pat. Ap. Cas. (Scotch) 261; Long *v.* Moor, 3 Esp. 155, note; Anderson *v.* Langdale, 3 B. & Ad. 660; Lewis *v.* Kramer, 3 Md. 265.

[4] Bank of Commerce *v.* Union Bank, 3 Coms. 230; Stevens *v.* Graham, 7 Serg. & R. 505; Hewins *v.* Cargill, 67 Me. 554; Ætna Bank *v.* Winchester, 43 Conn. 391; Ogle *v.* Graham 2 Pa. 132; Harsh *v.* Klepper, 28 Ohio St. 200; Craighead *v.* McLoney, 99 Pa. St. 211; Sutton *v.* Toomer, 7 B. & C. 416; Waterman *v.* Vose 43 Me. 504; Neff *v.* Horner, 63 Pa. St. 327; Dewey *v.* Reed, 40 Barb. 16; McGrath *v.* Clark, 56 N. Y. 36; Schwarz *v.* Opphold, 74 N. Y. 307; Glover *v.* Robbins, 49 Ala. 219; Boalt *v.* Brown, 13 Ohio St. 364; Lee *v.* Starbird, 55 Me. 491; Lamar *v.* Brown, 56 Ala. 157; Franklin Life Ins. Co. *v.* Courtney, 60 Ind. 349; Dietz *v.* Harder, 72 Ind. 208; Ivory *v.* Michael, 33 Miss. 398; Whitmer *v.* Frye, 10 Mo. 348; Moore *v.* Hutchinson, 69 Mo. 429; Patterson *v.* McNeely, 16 Ohio St. 348; Goodman *v.* Eastman, 4 N. H. 455; State Sav. Bank *v.* Shaffer, 9 Neb. 7; Schnewind *v.* Hacket, 54 Ind. 248; Reeves *v.* Pierson, 23 Hun (30 N. Y. S. C.), 187; Warrington *v.* Early, 2 El. & Bl. 763; Brown *v.* Jones, 3 Port. (Ala.) 420; Fay *v.* Smith, 1 Allen, 477; Draper *v.* Wood, 112 Mass. 315; Kilkelly *v.* Martin, 34 Wis. 525.

[5] Darwin *v.* Rippey, 63 N. C. 318; Church *v.* Howard, 24 N. Y. S. C.

etc.[1] *Fifth*, any alteration in the personality,[2] number,[3] and relations of the parties.[4] *Sixth*, any change in the liability of the parties, as where words are added to make the paper a joint, or a joint and several obligation;[5] the erasure or addition of words of negotiability,[6] of the words "without recourse" to an indorsement;[7] any alteration in the terms of the consideration, as by the addition of a

(16 Hun) 5; Angle *v.* N. W., etc., Ins. Co., 92 U. S. 330; Bogarth *v.* Breedlove, 39 Tex. 561.

[1] Stevens *v.* Graham, 7 S. & R. 505. See Martendale *v.* Follett, 1 N. H. 95; State *v.* Cilley, quoted in 1 N. H. 97; Schwalm *v.* McIntyre, 17 Wis. 232.

[2] Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Broughton *v.* Fuller, 9 Vt. 373; Davis *v.* Coleman, 7 Ired. 424; State *v.* Polk, 7 Blackf. 27; Smith *v.* Weld, 2 Barr. 54; Macara *v.* Watson, Thompson on Bills, 114; Richmond Mfg. Co. *v.* Davis, 7 Blackf. 412.

[3] Dickerman *v.* Miner, 43 Iowa, 508; Hamilton *v.* Hooper, 46 Iowa, 516; Hall *v.* McHenry, 19 Iowa, 521; Gardner *v.* Welsh, 5 El. & B. 82, overruling Catton *v.* Simpson, 8 Ad. & El. 136; Lunt *v.* Silver, 5 Mo. App. 186; Mouson *v.* Drakely, 40 Conn. 552; Mason *v.* Bradley, 11 M. & W. 590; Cumberland Bank *v.* Hall, 1 Halst. 215; Callandar *v.* Kirkpatrick, Thompson on Bills, 112; McCramer *v.* Thompson, 21 Iowa, 244; Wallace *v.* Jewell, 21 Ohio St. 163; Gillett *v.* Sweat, 1 Gilm. 475.

[4] Haskell *v.* Champion, 30 Miss. 136; Lamb *v.* Paine, 46 Iowa, 551. In Vance *v.* Collins, it is held that the erasure of the word "surety" after one of the signatures is not a material alteration. But see *contra* Rogers *v.* Tapp, *supra*; Lamb *v.* Paine, *supra*.

[5] Persing *v.* Hone, 2 Car. & P. 401; 4 Bing. 28; Humphreys *v.* Guillow, 13 N. H. 385; Hemmenway *v.* Stone, 7 Mass. 58; Clark *v.* Blackstock, Holt N. P. 474. But not so, if the rules of procedure make all joint contracts joint and several. Miller *v.* Reed, 27 Pa. St. 244; Gordon *v.* Sutherland, Thompson on Bills, 113.

[6] Johnson *v.* Bank of United States, 2 B. Mon. 310; State *v.* Stratton, 27 Iowa, 424; McAuley *v.* Gordon, 64 Ga. 221; Scott *v.* Walker, Dudley (Ga.) 243; Union N. B. *v.* Roberts, 45 Wis. 373; Bruce *v.* Westcott, 3 Barb. 274; Pepoon *v.* Stagg, 1 Nott & McC. 102; Brown *v.* Straw, 6 Neb. 536. But not if the words of negotiability were added for the purpose of correcting a mistake. Byron *v.* Thompson, 11 Ad. & El. 31; Kershaw *v.* Cox, 3 Esp. 246; 10 East, 437. See Cariss *v.* Tattersall, 2 Man. & G. 890.

[7] Luth *v.* Stewart, 6 Vict. R. 383.

specific consideration,[1] or any other change in the liability of the parties, as by making or obliterating memoranda,[2] or in any other way.[3] So, also, the addition of attesting witnesses, whenever attestation by witnesses affects the rights of parties.[4] *Seventh*, alterations in the place of payment either by inserting, changing, or erasing a specific place of payment.[5] And this is also true, even under the statutory provisions, which dispense with the necessity of proving presentment at the specific place of payment, leaving to the acceptor or maker the right to recover whatever damages he may have suffered by the failure to present at the named place of payment.[6] But it is held that the drawee has the right, on accepting a bill, to specify on the bill a place of payment in the city to which the bill was ad-

[1] Knill *v.* Williams, 10 East, 413; Low *v.* Argrove, 30 Ga. 129; 2 Parsons' N. & B. 562; Reeves *v.* Pierson, 23 Hun, 185. But see Herich *v.* Merchants' Nat. Bank, 34 Ind. 380; Bank of Commerce *v.* Barrett, 38 Ga. 126, where it is held that in the mere insertion of the statement of a specific consideration is not a material alteration.

[2] Warrington *v.* Early, 2 El. & Bl. 763; Woodworth *v.* Bank of America, 19 Johns. 381; Benedict *v.* Cowden, 49 N. Y. 396; Wheelock *v.* Freeman, 13 Pick. 165; Wait *v.* Pomeroy, 20 Mich. 425; Johnson *v.* Heagan, 23 Me. 329.

[3] Commonwealth *v.* Ward, 2 Mass. 397; Blake *v.* Coleman, 22 Wis. 415. See Warner *v.* Spencer, 7 J. J. Marsh. 340; Muldrow *v.* Baldwell, 7 Mo. 587; 2 Parsons' N. & B. 545.

[4] Eddy *v.* Bond, 19 Me. 461; Brackett *v.* Mountfort, 11 Me. 115. See Homer *v.* Wallis, 11 Mass. 309; Adams *v.* Frye, 3 Metc. 107.

[5] Nazro *v.* Fuller, 24 Wend. 374; Whitesides *v.* Northern Bank, 10 Bush, 501; Townsend *v.* Star Wagon Co., 10 Neb. 615; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392; Tidmarsh *v.* Grover, 1 Maule & S. 735; Cowie *v.* Halsall, 4 B. & Ald. 197; Rex *v.* Treble, 2 Taunt. 328; Burchfield *v.* Moore, 25 L. & Eq. 123; 5 El. & B. 683; Sudler *v.* Collins, 2 Houst. 538; Morehead *v.* Parkersburg Nat. Bank, 5 W. Va. 74.

[6] Mackintosh *v.* Haydon, Ry. & M. 362; Cowie *v.* Halsall, 4 B. & Ald. 497; Gardner *v.* Walsh, 5 El. & B. 83; Burchfield *v.* Moore, 5 El. & B. 683; Desbrowe *v.* Weatherby, 1 M. & Rob. 438; Hill *v.* Cooley, 46 Pa. St. 259; White *v.* Haas, 32 Ala. 430; Nazro *v.* Fuller, 24 Wend. 375; Oakey *v.* Wilcox, 3 How. (Miss.) 330, where it constitutes a memorandum. But see *contra* Am. Nat. Bk. *v.* Bangs, 42 Mo. 454.

dressed, the place designated by him being considered merely as a substitute for his residence or place of business.[1] But he cannot designate a place of payment in any other city or town.[2]

§ 395. **What are immaterial alterations — Correction of mistakes.** — An alteration is immaterial, whenever it does not change the legal effect of the instrument, as where words are added which are implied by law, or where words of no legal importance are either stricken out or added. Thus the writing out of the name of the bank after its cashier's signature as "cashier," is an immaterial alteration.[3] Of the same character is changing the marginal figures to conform to the written statement of the amount;[4] any change in the names of the parties, which does not affect their legal personalities;[5] and any other change in phraseology, which does not affect the legal liability of the parties.[6] Immaterial memoranda are placed on the same

[1] Troy City Bank *v.* Lauman, 19 N. Y. 480; Niagara Dist. Bank *v.* Fairman, 31 Barb. 405; Shuler *v.* Gillette, 19 N. Y. S. C. (12 Hun) 280. And this is permitted, even though the bill is made payable at a particular counting-house or office in the city. Troy City Bank *v.* Lauman, *supra*.

[2] Rowe *v.* Young, 2 B. & B. 165; Walker *v.* Bank of State of N. Y., 13 Barb. 637; Niagara Dist. Bank *v.* Fairman, 31 Barb. 404. But see Todd *v.* Bank of Ky., 3 Bush, 606; Rogers *v.* Posters, 1 Metc. (Ky.) 645.

[3] Folger *v.* Chase, 18 Pick. 63; Bank of Genesee *v.* Patchin Bank, 3 Kern, 309.

[4] Smith *v.* Smith, 1 R. I. 398. See *ante*, § 28.

[5] Blair *v.* Bank of Tennessee, 11 Humph. 84; Arnold *v.* Jones, 2 R. I. 345; Manchet *v.* Cason, 1 Brew. 307; Farquhar *v.* Southey, M. & M. 14; Desby *v.* Thrall, 44 Vt. 414; Cole *v.* Hill, 44 N. H. 227. This is true where the change consists in the addition or subtraction of a mere *descriptio personæ*. Manufacturers', etc., Bank *v.* Follett, 11 R. I. 92; Burlingame *v.* Brewster, 79 Ill. 515; Hayes *v.* Mathews 63 Ind. 412.

[6] Holland *v.* Hatch, 15 Ohio St. 464; Cushing *v.* Field, 70 Me. 50; Houghton *v.* Francis, 29 Ill. 244 (the insertion of dollar mark before the numerals); Leonard *v.* Phillips, 39 Mich. 782 (inserting the word "annually" after interest clause in a note which was made payable at a cer-

footing, and where they do not affect the legal liability, they may be changed or erased at pleasure.[1] Thus, the figures in the margin, which denote the number of the instrument in a particular series, the number of the check, note or bond, may be changed without constituting a material alteration.[2]

Of the same character are any changes in phraseology, which are intended, in correcting the mistakes of the parties, to conform the instrument to the intentions of the parties. They are held to be no alterations, although they do work a material change in the instrument.[3]

§ 396. **The effect of authorized alterations.** — If the alteration is made with the consent of the parties, it has the effect of making a new contract, and substituting the new for the old. If all the parties consent to the alteration, all are bound; but if only a portion of them give their assent to the change they will be bound, while those whose consent is not obtained will be discharged.[4]

tain time), Cooley, J., saying that in such a note "the rate of interest to be paid annually must be understood as naming only the rate to be paid for the yearly period." Leonard *v.* Wilson, 2 Cromp. & M. 589 (correcting a misspelling); Reed *v.* Roark, 14 Tex. 329 (writing over in ink a word written in pencil); Dunn *v.* Clements, 7 Jones L. 58 (retracing with darker ink a faded name or word); Hanson *v.* Crawley, 41 Ga. 303 (the insertion of a statement of the specific consideration).

[1] Bachellor *v.* Priest, 12 Pick. 399; Struthers *v.* Kendall, 5 Wright, 214; Walter *v* Cubley, 2 Cr. & M. 151.

[2] City of Elizabeth *v.* Force, 29 N. J. Eq. 591, overruling *s. c.* 28 N. J. Eq. 587; Berdsell *v.* Russell, 29 N. Y. 220; Commonwealth *v.* Industrial Sav. Bank, 98 Mass. 12; State ex rel. Plock *v.* Cobb. 64 Ala. 158.

[3] Brutt *v.* Piccard, R. & M. 273; McRaven *v.* Crissler, 53 Miss. 542; Duker *v.* Franz, 7 Bush, 273; Waugh *v.* Russell, 1 C. Marsh. 214; 5 Taunt. 707; Boyd *v.* Brotherson, 10 Wend. 93; Hunt *v.* Adams, 6 Mass. 519; Kershaw *v.* Cox, 3 Esp. 246; 10 East, 437; Jacobs *v.* Hart, 2 Stark. 45; Clute *v.* Small, 17 Wend. 242; Pease *v.* Dwight, 6 How. 190; Connor *v.* Routh, 7 How. (Miss.) 176.

[4] Wilson *v.* Jamison, 7 Barr, 126; Crimstead *v.* Briggs, 4 Iowa, 559; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392; Broughton *v.* Fuller,

Whether the alteration is material, is a question of law for the court;[1] but it is a question for the jury whether it was made with the consent of the parties.[2]

The alteration may be authorized in advance, or it may subsequently be ratified.[3] It may be express or implied from commercial custom,[4] or from the acts of the parties.[5] But the subsequent act cannot amount to a ratification, except as to *bona fide* holders without notice, if the party so acting did not at the time know of the alteration.[6]

§ 397. **Rights of bona fide holder of altered bill or note.**— If the party, whose liability has been changed by the alteration, could not, by the exercise of reasonable diligence, have prevented it, he is not liable on the paper, even to a *bona fide* holder. But if he has so executed the paper, viz.: by leaving blank and uncancelled spaces, as to enable alterations to be made in such a way as not to excite the suspicions of a reasonably prudent man, such a party is guilty of negligence, which renders him liable on

9 Vt. 373; Wills *v.* Wilson, 3 Ore. 308; Myers *v.* Nell, 84 Pa. St. 369. Under English stamp acts it is held that no change can be made after the issue of the instrument even with the consent of the parties. Bowman *v.* Nichol, 5 T. R. 547; Downes *v.* Richardson, 5 B. & Ald. 674; Bathe *v.* Taylor, 15 East, 412.

[1] Stevens *v.* Graham, 7 Serg. & R. 505; Jones *v.* Ireland, 4 Iowa, 63; Bowers *v.* Jewell, 2 N. H. 543.

[2] Stahl *v.* Berger, 10 Serg. & R 170; Stout *v.* Cloud, 5 Lit. 205; Overton *v.* Mathews, 35 Ark. 147.

[3] Morrison *v.* Smith, 13 Mo. 234; National State Bank *v.* Rising, 11 N. Y. S. C. (4 Hun) 793; Cariss *v.* Tattersall, 2 Man. & G. 890; Humphreys *v.* Guillow, 13 N. H. 385.

[4] Woodworth *v.* Bank of America, 19 Johns. 391.

[5] Bowers *v.* Jewell, 2 N. H. 543; Clute *v.* Small, 17 Wend. 238; Kershaw *v.* Cox, 3 Esp. 246 (subsequent indorsement of an instrument to which words of negotiability had been added); Cariss *v.* Tattersall, 2 Man. & G. 890 (subsequent payment of interest with knowledge of alteration); Humphreys *v.* Guillow, 13 N. H. 385 (promise to pay after knowing of the alteration.)

[6] Fraker *v.* Cullom, 21 Kan. 555.

the altered instrument to a *bona fide* holder.[1] The same conclusion is reached, where a part of the instrument had been written in pencil, and had subsequently been erased.[2] But the authorities are not in harmony on this question, and a number of authorities are to be found, which deny that the *bona fide* holder has a right of action in any case against the parties to an instrument, which has been altered without their consent.[3]

It has also been held that where one writes on the paper a memorandum in such a way that it can be detached without leaving marks of suspicion, he will be liable on the instrument, without the memorandum, to a *bona fide* holder, who takes it without notice.[4]

But in order that the party may still be bound to the *bona fide* holder, the alteration must have been made so as not to arouse the suspicion of a prudent man; and it

[1] "It is the duty of the maker of the note to guard not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease and without ready detection." Zimmerman *v.* Rote, 75 Pa. St. 188. See also to the same effect, Brown *v.* Reed, 79 Pa. St. 370; Blakey *v.* Johnson, 13 Bush, 204; Van Duzer *v.* Howe, 21 N. Y. 538; Isnard *v.* Tawes, 10 La. Ann. 103; Young *v.* Lehman, 63 Ala. 519; Toomer *v.* Rutland, 57 Ala. 379; Garrard *v.* Hadden, 67 Pa. St. 82; Yocum *v.* Smith, 63 Ill. 321; Rainbolt *v.* Eddy, 34 Iowa, 440; Vischer *v.* Webster, 8 Cal. 109; Redlich *v.* Doll, 54 N. Y. 237; Kitchen *v.* Place, 41 Barb. 465. But see McGrath *v.* Clark, 56 N. Y. 36; Young *v.* Grate, 4 Bing. 253, which, however, has been questioned, if not overruled in Bank of England *v.* Evans, 5 H. of L. Cas. 389; Bazendale *v.* Bennett, L. R. 3 Q. B. D. 525; 47 L. J. Q. B. 624; 26 W. R. 899; 33 Am. Rep. 137; 40 L. T. R. 23, Bramwell, L. J.

[2] Harvey *v.* Smith, 55 Ill. 224, Seibel *v.* Vaughn, 69 Ill. 257. See also Elliott *v.* Levings, 55 Ill. 214.

[3] Holmes *v.* Trumper, 22 Mich. 427; Washington Sav. Bank *v.* Ekey, 51 Mo. 273; Greenfield Sav. Bank *v.* Stowell, 123 Mass. 196. See Knoxville Nat. Bank *v.* Clark, 51 Iowa, 264; Abbott *v.* Rose, 62 Me. 194.

[4] Noll *v.* Smith, 64 Ind. 511; Carnell *v.* Nebeker, 58 Ind. 425; Phelan *v.* Moss, 67 Pa. St. 59; Zimmerman *v.* Rote, 75 Pa. St. 188. But see *contra* Wait *v.* Pomeroy, 20 Mich. 425; Benedict *v.* Cowden, 49 N. Y. 396; Gerrish *v.* Glines, 56 N. H. 9.

must have become possible through the negligence of the party to the obligation. If the alteration is unconcealed,[1] or the obligor has not been guilty of negligence, the *bona fide* holder cannot recover.[2]

§ 398. **Effect of adoption of a forged signature as one's own.** — What effect the adoption of a forged signature as one's own will have, depends upon the attending circumstances. If a *bona fide* holder takes the paper in reliance upon the adoption or acknowledgment of the signature, the party acknowledging it will be bound by the forged signature.[3] If no one is misled by the acknowledgment, and it is made under the mistaken belief that the signature was genuine, the party so acknowledging is not bound by it, after he discovers his error.[4] But the authorities are divided

[1] Angle *v.* N. W., etc., Ins. Co., 92 U. S. 324; Paramore *v.* Lindsey, 63 Mo. 63.

[2] Hall *v.* Fuller, 5 Barn. & C. 750; Garrard *v.* Hadden, 67 Pa. St. 82; Worrall *v.* Green, 3 Wright, 388; Trigg *v.* Taylor, 27 Mo. 245. A good example of an alteration for which the maker is not responsible is the somewhat common fraud of patent vendors in agricultural communities, practiced by inducing the victim to sign the following instrument, under the impression that it was a written appointment as agent:—

NORTH EAST, April 3, 1871.

Six months from date I promise to pay to J. B. Smith or order, Two Hundred and Fifty Dollars for value received, with legal interest, without defalcation or stay of execution. * bearer fifty dollars when I sell by worth of hay and harvest grinders, appeal and also without

T. H. BROWN. * Agent for Hay & Harvest Grinders.

The paper was so written that no suspicion was aroused; but after its execution it was cut into two parts where the asterisks are placed, and the one part becomes a complete promissory note, but it was held that even a *bona fide* holder could not recover on it. Brown *v.* Reed, 79 Pa. St. 370.

[3] Workman *v.* Wright, 33 Ohio St. 405 (31 Am. Rep. 546); Casco Bank *v.* Keene, 53 Me. 104; Dow *v.* Sperry, 29 Mo. 390; Beeman *v.* Duck, 11 M. & W. 251; Leach *v.* Buchanan, 4 Esp. 226; Woodruff *v.* Munroe, 33 Md. 158; Greenfield Bank *v.* Crafts, 4 Allen, 447; Crout *v.* DeWolf, 1 R. I. 393; Rudd *v.* Mathews, 79 Ky. 479 (37 Am. Rep. 704); Hefner *v.* Dawson, 63 Ill. 403.

[4] Woodruff *v.* Munroe, 33 Md. 158.

as to the effect of a deliberate adoption of a forged signature, when no one is misled, some holding that the party is bound by it as a ratification of an unauthorized agency;[1] while others deny his liability, on the ground that there is no consideration for the adoption, which amounts to a promise, except possibly the express or implied promise to refrain from criminal prosecution, which would be a void consideration.[2]

If it can be shown that the drawee or acceptor was in the habit of paying bills, on which his acceptance was forged by a certain individual, he will be held liable by adoption on all such acceptances.[3] But he will be liable only when he has by his conduct induced the person taking the paper to believe that the acceptances were genuine.[4]

§ 399. **When one is estopped from denying the genuineness of another's signature.** — The maker of a note is never estopped from denying the genuineness of the other signatures, unless some one or more of them were already on the note, when the maker negotiated it. In that case, the maker guarantees the genuineness of those signatures,[5] and the same rule holds good of the drawer.[6] But the

[1] Ashpitel *v.* Bryan, 3 B. & S. 492; 32 L. J. Q. B. 91; 7 L. R. T. (N. S.) 706; Howard *v.* Duncan, 3 Lansing 175; Greenfield Bank *v.* Crafts, 4 Allen, 447; Wellington *v.* Jackson, 121 Mass. 157; Casco Bank *v.* Keene, 53 Me. 103; Forsythe *v.* Bonta, 5 Bush, 547.

[2] Shisler *v.* Van Dyke, 92 Pa. St. 449 (31 Am. Rep. 553); Brook *v.* Hook, L. R. 6 Exch. 89 (31 Am. Rep. 549); McKenzie *v.* British Linen Co. 44 L. T. R. 431; Kernan *v.* London Discount & M. Bank, 4 Vict. R. 279; Workman *v.* Wright, 32 Ohio St. 405 (31 Am. Rep. 547); McHugh *v.* Schuylkill County, 7 P. F. Smith, 391 (5 Am. Rep. 447); Pearsall *v.* Chapin, 8 Wright, 9; Negley *v.* Lindsay, 17 P. F. Smith, 217.

[3] Barber *v.* Gingell, 3 Esp. 60; Crout *v.* De Wolf, 1 R. I. 393.

[4] Morris *v.* Bethell, L. R. 5 C. P. 47; Mather *v.* Lord Maidstone, 18 C. B. (N. S.) 273; 37 Eng. L. & Eq. 335.

[5] Hortsman *v.* Henshaw, 11 How. 177; Meacher *v.* Fort, 3 Hill (S. C.), 227; Beaman *v.* Duck, 11 M. & W. 251.

[6] Coggill *v.* Am. Exch. Bank, 1 Comst. 113; Hortsman *v.* Henshaw, 11 How. 177; Meacher *v.* Fort, 3 Hill (S. C.), 227.

drawee, by accepting the bill, guarantees the genuineness of the drawer's signature, and is bound, whether the holder received the bill before or after acceptance ;[1] although some of the authorities are disposed to question the power of one who takes the bill before acceptance to hold the drawee on his acceptance, where the drawer's signature is forged, on the ground that the payee or holder is himself guilty of negligence in not inquiring after the genuineness of the drawer's signature.[2] It has, however, been said that there are two exceptions to this general rule, that the drawee is estopped from denying the signature of the drawer: *first*, when the payee demands payment;[3] and *secondly*, where both parties are mutually in fault.[4]

The drawee only guarantees the genuineness of the signature, and not of the contents of the bill. If the forgery consisted of an alteration of the contents, the acceptor would not be liable on the bill to the holder.[5] Nor does the drawee by his acceptance guarantee the genuineness of the indorsements.[6] And this is true, even though one of

[1] National Park Bank *v.* Ninth National Bank, 46 N. Y. 81; Bank of Commerce *v.* Union Bank, 3 Comst. 235; Goddard *v.* Merchants' Bank, 4 Comst. 149; Gloucester Bank *v.* Salem Bank, 17 Mass. 43; Canal Bank *v.* Bank of Albany, 1 Hill, 239; Stout *v.* Benoist, 39 Mo. 280; Bernheimer *v.* Marshall, 2 Minn. 81. See also National Bank of Commerce *v.* Nat. M. B. Assn., 55 N. Y. 213; White *v.* Cent. Nat. Bank, 64 N. Y. 322; Price *v.* Neal, 3 Burr. 1355; Smith *v.* Mercer, 6 Taunt. 76; 1 Marsh. 453; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333. But see Allen *v.* Fourth Nat. Bank, 59 N. Y. 12.

[2] Ellis *v.* Ohio Life Ins. etc., Co., 4 Ohio St. 632, McKleroy *v.* Southern Bank of Ky., 14 La. Ann. 458; Canal Bank *v.* Bank of Albany, 1 Hill, 287; 2 Daniel's Negot. Inst., §§ 1361, 1362.

[3] Redfield & Bigelow's Lead. Cas. 664.

[4] Redfield & Bigelow's Lead. Cas. 665; Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628; National Bank of N. A. *v.* Bangs, 106 Mass. 441.

[5] White *v.* Continental Nat. Bank, 64 N. Y. 317; Kingston Bank *v.* Eltinge, 40 N. Y. 323; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Young *v.* Lehman, 63 Ala. 519.

[6] White *v.* Continental Bank, 64 N. Y. 320; Johnson *v.* First Nat.

the indorsements is by the drawer, where the bill had been made payable to the order of the drawer.[1] If, however, the drawee accepts and negotiates a bill with the knowledge that a forged indorsement is on the bill, he cannot deny the genuineness of that indorsement.[2] Nor can he recover back the money paid on a forged indorsement where the indorsement was on the bill when it was drawn and accepted.[3] But the indorser, as well as the transferrer by delivery, is estopped from denying the validity of the signature of any party to the instrument, whose name was on the paper when he transferred it. He guarantees the validity of his title in every respect, which would be invalidated if any of the signatures had been forged.[4]

§ 400. **Recovery of money paid on forged instruments.** — In conformity with the general rule of law, that money paid under a mistake of fact may be recovered back,[5] any party to a forged negotiable instrument may recover back money paid on it under the mistaken belief

Bank, 13 N. Y. S. C. (6 Hun) 124; Talbot *v.* Bank of Rochester, 1 Hill, 295; Smith *v.* Chester, 1 T. R. 654; Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.), 287; United States *v.* Nat. Park Bank, 6 Fed. Rep. 852.

[1] Beaman *v.* Duck, 11 M. & W. 251; Robinson *v.* Yarrow, 7 Taunt. 455; Williams *v.* Drexel, 14 Md. 566. But see *contra* Cooper *v.* Meyer, 10 B. & C. 468, 5 Man. & G. 387, where the signature of the drawer and of the first indorsement was of a fictitious name.

[2] Beaman *v.* Duck, 11 M. & W. 251.

[3] Hortsman *v.* Henshaw, 11 How. 177; Coggill *v.* Am. Exch. Bank, 1 Comst. 113.

[4] MacGregor *v.* Rhodes, 6 El. & B. 266; State Bank *v.* Flaring, 16 Pick. 533; Smith *v.* McNair, 19 Kan. 330; White *v.* Continental Nat. Bank, 64 N. Y. 320; Burgess *v.* Northern Bank of Ky., 4 Bush, 600; Cabot Bank *v.* Morton, 4 Gray, 157; Lyons *v.* Millery, 6 Gratt. 439. See *ante* chapters on Transfer in General, and by Indorsement.

[5] Louisiana *v.* Wood, 102 U. S. 298; Carpenter *v.* Northborough Nat. Bank, 123 Mass. 69; Nat. Bank of N. A. *v.* Bangs, 106 Mass. 441; Boylston Nat. Bank *v.* Richardson, 101 Mass. 287; Welch *v.* Goodwin, 123 Mass. 71; Merriam *v.* Wolcott, 3 Allen, 258; Moses *v.* McTerlar, 2 Burr. 1005; Young *v.* Lehman, 63 Ala. 523.

in its genuineness, provided he is not guilty of any negligence in notifying the payee of his discovery of the forgery, which results in damage to others.[1] According to the English law, the notice of the forgery must be given soon enough to enable the holder to give the notice of dishonor required in order to hold the indorsers; in other words, the forgery must be discovered and notice given to the payee within twenty-four hours after payment, where there are intermediate indorsers.[2] But a more liberal rule prevails in the United States, and all that is required in order to recover back the money paid is to give notice to the payee within a reasonable time after the discovery of the forgery.[3] And the same rule has been applied to the payment of money by banks on the forged checks of their depositors.[4] The notice must be given within a reasonable time after the discovery of the forgery, whether there are indorsers or not.[5] Where the instrument is an utter forgery, it is not necessary to return it with a demand for the repayment of the money paid on it; but if there are some genuine signatures on it, it must be returned, so that the payee may proceed against the other parties, whose signatures are genuine.[6]

[1] Allen *v.* Sharpe, 37 Ind. 73; 2 Parsons' N. & B. 597; United States *v.* Nat. Park Bank, 6 Fed. R. 852; Lawrence *v.* Am. Nat. Bank, 54 N. Y. 435; National Bank of Commerce *v.* Nat. M. B. Assn., 55 N. Y. 211; Fraker *v.* Little, 24 Kan. 599; Young *v.* Lehman, 63 Ala. 523; Welch *v.* Goodwin, 123 Mass. 77.

[2] Cocks *v.* Masterman, 1 B. & C. (17 Eng. C. L. R.) 902.

[3] Allen *v.* Fourth Nat. Bank, 59 N. Y. 12; Third Nat. Bank *v.* Allen, 59 Mo. 310; Koontz *v.* Central Nat. Bank, 51 Mo. 275; Canal Bank *v.* Bank of Albany, 1 Hill, 291; Goddard *v.* Merchants' Bank, 4 Comst. 149; Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 658.

[4] Weisser *v.* Dennison, 10 N. Y. 69; Welsh *v.* German-American Bank, 73 N. Y. 424; Hardy *v.* Chesapeake Bank, 51 Md. 562; National Bank *v.* Tappan, 6 Kan. 465.

[5] Smith *v.* Mercer, 6 Taunt. 76; Davies *v.* Watson, 2 Nev. & M. 709; Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

[6] Brewster *v.* Burnett, 125 Mass. 68; First Nat. Bank *v.* Peck, 8 Kan. 660; Smith *v.* McNair, 19 Kan. 382.

CHAPTER XXI.

EXCHANGE AND RE-EXCHANGE, AND DAMAGES.

SECTION 405. Exchange and re-exchange explained.
406. Statutory damages *in lieu* of re-exchange.
407. Indorsers liable for re-exchange or damages.
408. Is acceptor liable for re-exchange.
409. What law determines liability for re-exchange.
410. Re-exchange and damages upon promissory notes.
411. Effect of part payment on claim for re-exchange.
412. Interest — what rate recoverable.

§ 405. **Exchange and re-exchange explained.** — As was explained in a previous paragraph [§ 3], the object of a bill of exchange was to facilitate the transfer of money, in the settlement of commercial transactions between different places, without the transportation of the money itself. For example, a New Yorker, in debt to some one in Liverpool, will pay that debt by a bill of exchange drawn by a New York creditor on his Liverpool debtor. If New York owes as much to Liverpool as Liverpool owes to New York, there will be equal demand for exchange on both places. But if there are more liabilities in one place than there are in the other, an inequality of demand arises, which results in making the exchange cheaper in one place and dearer in the other. If New York owes more to Liverpool, exchange in New York on Liverpool will be at a premium, while exchange in Liverpool on New York will be at a discount. This premium or discount is called the *exchange* or *rate of exchange*. Under these circumstances, a bill of exchange in Liverpool for one thousand dollars will cost in New York one thousand dollars *plus* the premium. If the Liverpool

drawee should refuse payment, when the bill was presented to him, the drawer and indorsers are of course liable on the bill, for they guarantee payment in Liverpool. But if the payee or holder can only recover of the drawer in New York the face value of the bill, viz.: one thousand dollars, he will lose the premium which he or his indorser had to pay for the bill. Inasmuch as the drawer guarantees complete indemnity against loss in consequence of dishonor of the bill, it became a rule of the law merchant that the holder may, in the place of payment of the original bill, draw a bill on the original drawer for an amount of money, which will be worth, in the original drawer's domicile, the face value of the original bill in its place of payment. Or, to return to the specific example given above, should the Liverpool drawee refuse to honor the bill, the holder is authorized to draw on the New York drawer for one thousand dollars *plus* the ruling premium of exchange. This second bill is called a bill of re-exchange.

As a matter of fact, this bill of re-exchange is seldom drawn, but the principle of re-exchange is recognized everywhere in the commercial world, and forms the basis for the claim of damages for the dishonor of a bill.[1]

[1] "The doctrine of re-exchange is founded upon equitable principles. A bill is drawn in this country, payable in Paris, France. The payee gives a premium for it, under the expectation of receiving the amount at the time and place where the bill is made payable. It is protested for non-payment. Now the payee and holder is entitled to the amount of the bill in Paris. The same sum paid in this country, including costs of protest and other charges, is not an indemnity. The holder can only be remunerated by paying to him, at Paris, the principal, with costs and charges; or by paying to him in this country those sums, together with the difference in value between the whole sum at Paris and the same amount in this country. And this difference in value is ascertained by the premium on a bill drawn in Paris, and payable in this country, which should sell at Paris for the sum claimed." Bank of the United States *v.* United States, 2 How. 737.

§ 406. **Statutory damages in lieu of re-exchange.** — In almost all parts of the civilized world, however, the claim for re-exchange, the rate of which has to be computed on each bill, and which would vary with the fluctuations of the money market, — is now superseded by statutory provisions for the recovery of liquidated damages. The matter being now regulated minutely by statute, the whole doctrine of re-exchange has ceased to be of any practical importance, except for the purpose of explaining the fundamental principle, underlying the claim for the statutory damages. Nothing could be desired in this matter in the way of its simplification, if there was a national statute governing all such cases arising within the United States. As it is now, each of the forty-two States of the Union has its own statute on the subject, and each statute differs in its provisions. For this reason, also, it would be difficult, if at all possible, to give any concise statement of the provisions in an elementary work like the present.

§ 407. **Indorsers liable to re-exchange or damages.** — Indorsers are themselves, in every essential respect, drawers of a bill of exchange; so that if the indorsed bill is dishonored by the drawee or acceptor, the indorsers, as well as the drawer, are liable to re-exchange, or to damages *in lieu* thereof. And if the holder should demand re-exchange of his immediate indorser, he can in turn recover of the next indorser, not only the amount paid by him by way of exchange between the place of dishonor and the place of the last indorsement; but also the re-exchange between the places of the last and next indorsement. And each successive indorser has the same claim against the party next to him, until the drawer is reached, who will be compelled to pay all the sums which the successive indorsers have had to pay out by way of re-exchange. Although this

has been doubted,[1] the rule may be considered as definitely settled in conformity with the text.[2]

§ 408. **Is acceptor liable to re-exchange.** — It has been held that the acceptor is liable to re-exchange, as well as the drawer and indorsers.[3] But the better opinion is, per-

[1] Story on Bills, § 402, quoting Jousse Comms. Sur. L'Ord, 1673, tit. 6, art. 4, pp. 139, 140; Forbes, 151; Glen, 274.

[2] "It has been said that the drawer ought not to be liable for any but the direct re-exchange between the place of drawing and the place of payment, unless he has given permission to negotiate the bill in other places. But such a permission is implied by the drawer issuing a negotiable document, since the holder for the time is entitled to indorse it to any person he pleases; and, on the other hand, the last holder, being entitled, in case of its dishonor, to redraw on any previous indorser, in order to make good his recourse against such indorser, who again has a right to do the same with any prior indorser, the drawer, as he is liable for all the consequences of dishonor, must be liable for the accumulated re-exchange arising on the successive re-drafts, because that results from the negotiability of the document which he has issued." See also to same effect D'Astet *v.* Baring, 11 East, 265; Mellish *v.* Simeon, 2 H. Bl. 379; Crawford *v.* Branch Bank, 6 Ala. (N. S.) 15.

[3] Francis *v.* Rucker, Ambler, 672; In re General So. Am. Co., 7 Ch. Div. L. R. 645; Walker *v.* Hamilton, 1 D. F. & J. 502; Prehn *v.* Royal Bank of Liverpool, L. R. 6 Exch. 92; Riggs *v.* Lindsay, 7 Cranch, 500, Livingston, J., saying: "As Lindsay was expressly authorized to draw, he certainly had a right to do so; and whether the defendants accepted his bill or not, so as to render themselves liable to the holders of them, there can be no doubt, that, as between Lindsay and them, it was their duty, and that they were bound in law to pay them. Not having done so, and Lindsay, in consequence of their neglect, having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety (as he may well be considered from the moment he drew the bills), it may well be said that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to re-imburse Lindsay for the damages, which, by the law of South Carolina, he was compelled to pay, and which may, therefore, also be considered a part of the debt due by the defendants in consequence of the violation of their promise."

haps, that the acceptor is not liable for re-exchange, properly so-called, although he would be liable to the drawer for all the damages he was obliged to pay on account of the dishonor of the bill, if he was under any legal obligation to honor it.[1]

§ 409. **What law determines liability for re-exchange.** — Although the drawer's guaranty is that the drawee shall pay the bill according to its tenor at the designated place of payment, or at the domicile of the drawee; yet, if the bill be dishonored, his liability for re-exchange will be determined, not by the law of the place of payment or of the drawee's domicile, as the case might be, but by the law of the place, where the bill was drawn.[2] And the indorser's liability is determined by the law of the place, where he indorses.[3] But he would also be liable for whatever re-exchange any subsequent indorsee had been obliged to pay.[4]

§ 410. **Re-exchange and damages upon promissory notes.** — Promissory notes do not, according to the law merchant, come within the rule concerning the claim for re-exchange. But where the note expressly provides for

[1] Tramwell *v.* Hudmon, 56 Ala. 237; Hanrick *v.* Farmers' Bank, 8 Port. (Ala.) 539; Newman *v.* Gozo, 2 La. Ann. 642; Watt *v.* Riddle, 8 Watts, 545; Bowen *v.* Stoddard, 10 Met. 377, Hubbard, J., saying: "In cases where the drawers have been obliged to take up bills, and pay damages, because the acceptors suffered them to be protested when they had funds of the owners in their hands, and were as between themselves and the drawers bound to accept, they may recover such damages of the acceptors, because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that the acceptor as such is liable to pay damages by reason of his acceptance." See also Napier *v.* Schneider, 12 East, 420; Woolsey *v.* Crawford, 2 Camp. 445; Dawson *v.* Morgan, 9 B. & C. 618.

[2] Allen *v.* Kemble, 6 Moore P. C. 314; Gibbs *v.* Fremont, 9 Exch. 25; 20 Eng. L. & Eq. 555.

[3] Story on Bills, § 153.

[4] 2 Daniel's Negot. Inst., § 1452.

payment "with exchange,"[1] and, also, after the note has been indorsed, since the indorsement of a promissory note is but a bill of exchange on the maker,[2] the rule is said to apply to notes as well as to bills.

But whether this be technically correct or not, it is the ruling of both English and American courts, that the holder of a promissory note is entitled to recover, in addition to principal, interest and costs of protest, whatever may be necessary to replace the money in the country where it ought to have been paid.[3] But the correctness of this ruling is denied by respectable authorities.[4] Probably everywhere now this matter is dependent upon the provisions of the statute, which governs the particular case under inquiry.

§ 411. **Effect of part payment on claim for re-exchange.** — It has been held in a number of cases that part payment of the bill and a protest for the residue will reduce the claim for re-exchange, or the substitute statutory damages, proportionately. In other words, the amount of damages recoverable is proportioned to the loss sustained by the dishonor.[5] But if the part payment occurs subse-

[1] Pollard *v.* Herries, 3 Bos. & P. 335; Grutacap *v.* Woulluise, 2 McLean, 584.

[2] Howard *v.* Central Bank, 3 Kelly, 375.

[3] Grant *v.* Healey, 3 Sumn. 523; Lee *v.* Wilcocks, 5 Serg. & R. 48; Scott *v.* Bevan, 2 Barn. & Ad. 78; Smith *v.* Shaw, 2 Wash. C. C. 167; Bank of Missouri *v.* Wright, 10 Mo. 719; Cash *v.* Kennion, 11 Ves. 314. In Lee *v.* Wilcocks, *supra*, the payment was to be in Turkish piastres, and it was held to be the settled rule "where money is the object of the suit, to fix the value according to the rate of exchange at the time of the trial."

[4] Adams *v.* Cordis, 8 Pick. 260; Lodge *v.* Spooner, 8 Gray, 166; Martin *v.* Franklin, 4 Johns. 124; Day *v.* Scofield, 20 Johns. 102.

[5] Laing *v.* Barclay, 3 Stark. 38; Chitty on Bills [*687], 768; Bangor Bank *v.* Hook, 5 Greenl. 174; Warner *v.* Combs, 20 Me. 139; Story on Bills, § 399.

quent to a protest for non-payment of the whole bill, it will not cut down the claim for damages.[1]

§ 412. **Interest — What rate recoverable.** — Where the law prescribes a certain rate of interest to be recovered in the absence of an express contract for another rate, and permits the recovery of a higher rate of interest, it is always a doubtful question whether the contract for a different rate of interest determines the rate of interest to be claimed of the debtor after as well as before maturity, or whether the legal rate should then prevail. Although there are many cases which hold that only the legal rate can in any case be recovered after maturity,[2] the better opinion is that the conventional rate is recovered after as well as before maturity.[3] In the United States Supreme Court the minority rule is followed in all cases where the judgment is not controlled by local law;[4] but when a case comes up from one of the States, the question is considered a matter

[1] Hargous *v.* Lahens, 3 San. 21, Sanford, J., saying: "The liability for damages becomes perfect on the return of the protested bill. A subsequent part payment by the acceptor can have no greater influence than in a similar part payment by the drawer or any other party. It is as fixed and determinate an obligation as the debt represented by the sum expressed in the bill itself."

[2] Duran *v.* Ayer, 67 Me. 145; Eaton *v.* Boissonault, 67 Me. 540; McComber *v.* Dunham, 8 Wend. 550; Henry *v* Thompson, Minor, 209; Perry *v.* Taylor, 1 Utah, 63; Ludwick *v.* Hutsinger, 5 Watts & Serg. 51; Newton *v.* Kennerly, 31 Ark. 626.

[3] Seymour *v.* Continental Life Ins. Co., 44 Conn. 300; Pridgen *v.* Andrews, 7 Tex. 461; Hopkins *v.* Crittenden, 10 Tex. 189; Hand *v.* Armstrong, 18 Iowa, 324; Thompson *v.* Pickel, 20 Iowa, 490; Briscoe *v.* Kenealy, 8 Mo. App. 77; Kohler *v.* Smith, 2 Cal. 597; Foulay *v.* Hall, 12 Ohio, 615; Morgan *v.* Jones, 20 Eng. L. & Eq. 454; Cecil *v.* Hicks, 29 Gratt. 1; Overton *v.* Balton, 9 Heisk. 762; Phinney *v.* Baldwin, 16 Ill. 108; Cox *v.* Smith, 1 Nev. 171; Pruyne *v.* Milwaukee, 18 Wis. 568. See Cromwell *v.* County of Sac, 96 U. S. 61; Payne *v.* Caswell, 68 Me. 89; Andrew *v.* Keeler, 19 Hun, 87.

[4] Holden *v.* Trust Co., 100 U. S. 72.

of local law, and the court follows the decisions of the State from which the case comes.[1]

Of course such a question cannot be raised where the contract expressly provides for the recovery of the contractual rate after maturity.[2] And it is even permissible for the parties, by express agreement, to provide for a higher rate of interest after maturity, as liquidated damages for the dishonor.[3]

[1] Ohio *v.* Frank, 103 U. S. 698; Cromwell *v.* County of Sac, 96 U. S. 61, explaining Brewster *v.* Wakefield, 22 How. 118.

[2] Eaton *v.* Boissonault, 67 Me. 540; Cecil *v.* Hicks, 29 Gratt. 1.

[3] Bane *v.* Gridley, 67 Ill. 388.

CHAPTER XXII.

THE RIGHTS AND LIABILITIES OF SURETIES AND GUARANTORS.

SECTION 415. Suretyship and guaranty distinguished.
416. Forms and kinds of guaranties.
417. The consideration of guaranties.
418. How affected by the statute of frauds.
419. Negotiability of guaranties.
420. Notice of acceptance of guaranty.
421. Necessity for demand of principal and notice of default to guarantor.
422. Concealed sureties as accommodation parties — Nature of their liability — Admissibility of parol evidence to prove real character.
423. What acts will discharge guarantors and sureties.
424. Continued — Surrender of securities and extension of time of payment.
425. Presumption of indulgence, arising from receipt of securities.
426. The remedies of the surety — Contribution.

§ 415. **Suretyship and guaranty distinguished.** — Both the surety and the guarantor promise to answer for the debt or default of another; or, to be perhaps more accurate, both in the case of the default of another are obliged to pay the debt or render the service. Surety may be called a species of guaranty, if the subject is considered generally; and guaranty may be considered as a species of surety, if one considers alone the bearing of the subject on commercial paper. The surety is a guarantor of the payment of the face value of the note, who assumes this liability by becoming a regular party to the paper, as drawer or indorser, but usually as co-maker of a promissory note. Where the surety is co-maker, the obligation to pay becomes

his own immediately upon failure of the principal to pay, without any previous demand on the principal or notice of his default.[1] But where he signs as accommodation drawer or indorser, he assumes the peculiar contingent liability of these parties which depends upon the previous presentment of the paper to the primary obligor for payment, and the giving of notice of dishonor. But, with a proper recognition of that point of distinction, it may be useful, in discussing what acts will discharge a surety or guarantor, to state, in conformity with numerous decisions, that the drawer of a bill of exchange and the indorsers of bills and notes are sureties of the acceptor or maker to the holder.[2] And one indorser may be said to be surety for all prior parties to a subsequent indorser.[3]

The guarantor is never a regular party to the commercial instrument, and his liability depends upon an independent, collateral agreement, which provides for the payment of the debt by the guarantor in case the primary debtor fails to pay. The liability of the indorser is somewhat similar, but differs in this, that the indorser is discharged from liability, if there has not been due presentment and notice.[4] The

[1] 2 Parsons' N. & B. 118; Perry *v.* Barrett, 18 Mo. 140. Such a surety is said to be "an insurer of the debt; the guarantor is the insurer of the solvency of the debtor." Crampt's Exrx. *v.* Hatz' Exrs., 52 Pa. St. 525; Reigart *v.* White, 52 Pa. St. 438; Arents *v.* Commonwealth, 18 Gratt. 770.

[2] Wallace *v.* McConnell, 13 Pet. 136; English *v.* Darley, 2 Bos. & P. 61; Clark *v.* Devlin, 3 Bos. & P. 363; Blair *v.* Bank of Tenn., 11 Humph. 84; Gould *v.* Robson, 8 East, 576; Bank of U. S. *v.* Hatch, 6 Pet. 250; Lobdell *v.* Niphler, 4 La. 295; Hefford *v.* Morton, 11 La. 117; Wood *v.* Jefferson Co. Bank, 9 Cow. 194; Hubbly *v.* Brown, 16 Johns. 70; Veazie *v.* Carr, 3 Allen, 14; Burrill *v.* Smith, 7 Pick. 291; Priest *v.* Watson, 7 Mo. App. 578; Millandon *v.* Arnous, 15 Mart. 596. But see Trimble *v.* Thorn, 16 Johns. 152; Beardsley *v.* Warner, 6 Wend. 613, where it is held that the indorser cannot be considered a surety so far as to enable him to take advantage of a statutory provision, giving to sureties the right to call upon the creditor to prosecute the principal.

[3] Newcomb *v.* Raynor, 21 Wend. 108.

[4] See chapters on Presentment, Protest and Notice of Dishonor.

guarantor is bound to pay if he receives notice of the principal's default within a reasonable time after maturity, and his liability is not affected by the failure to make presentment and protest exactly on the day of maturity, unless he can show that he has been damaged by the delay.[1]

It is held that the same person may be both guarantor and indorser, so that he may still be liable as a guarantor, although he has been discharged of his liability as an indorser.[2] And where one writes his name on the back of a negotiable instrument, without being payee or indorsee, and without indicating on the paper the character in which he signed, it is exceedingly difficult to say, in the light of the authorities, what is the nature of his liability. This subject has been fully discussed, and the authorities cited elsewhere ;[3] and it will not be necessary to make any further reference to it in this connection.

§ 416. **Forms and kinds of guaranties.**— The guaranty is not required to assume any particular form. It may be a separate instrument; or it may be written on or across the commercial paper, whose payment is guaranteed. The guaranty may, as to the liability to pay, be absolute, or conditional upon the happening of some other contingency than the default of the principal debtor.[4] It may also be limited or unlimited in respect to the amount as well as to time, and the number of the transactions. And it depends, altogether, upon the language of the guaranty which con-

[1] Axents *v.* Commonwealth, 18 Gratt. 770; Camden *v.* Doremus, 3 How. 515; Jones *v.* Ashford, 79 N. C. 176; Dickerson *v.* Derrickson, 39 Ill. 577; Montgomery *v.* Kellogg, 43 Miss. 486; Clay *v.* Edgerton, 19 Ohio St. 553. But see *post*, § 421.

[2] Deck *v.* Works, 57 N. Y. Pr. 292.

[3] See *ante*, chapter on Transfer by Indorsement.

[4] Dickerson *v.* Derrickson, 39 Ill. 575; Cumpston *v.* McNair, 1 Wend. 457; Curtis *v.* Smallman, 14 Wend. 231; Loveland *v.* Shepherd, 2 Hill, 139; Moakley *v.* Riggs, 19 Johns. 69.

struction will prevail. In reference to the guaranty of commercial paper, these questions do not cause the same difficulty, as they do in application to guaranties in general. The only point, at which any difficulty may be experienced, is to determine when a guaranty authorizes the loan of "any sum" within a certain figure, whether it was a continuing guaranty, or whether it is exhausted by the first loan. It is held to be exhausted where, in speaking of the loan, the language used is singular in number.[1] But where language was used in the plural, and indicated the authority for repeated loans within the limit as to amount, it would be held to cover any loan or loans while keeping within the stipulated amount.[2]

§ 417. **The consideration of guaranties.** — When the guaranty is contemporaneous with the creation of the original liability, the same consideration will support the guaranty which supports the principal contract. In such a case the credit is given to both, and not to one alone, although only one may derive any substantial benefit from the transaction.[3] But where the guaranty is given after

[1] Cremer *v.* Higginson, 1 Mason, 323 ("the object of the present letter is to request you, if convenient, to furnish them (S. & H. H.) *with any sum they may want*, as far as fifty thousand dollars"). See also Ranger *v.* Sargent, 36 Tex. 26.

[2] Sansome *v.* Bell, 2 Camp. 39 ("to the amount of £10,000, on certain acceptances, or any other account thereafter to subsist between A. & B."); Merle *v.* Wells, 2 Camp. 413 ("any debt A. B. may contract in his business as jeweller, not exceeding," etc.); Mayer *v.* Isaacs, 6 M. & W. 605 ("any bills you may draw on him on account, etc., to the amount," etc.); Douglass *v.* Reynolds, 7 Pet. 113 (the bearer "might require your aid from time to time" and the guarantor promises "to be responsible at any time for a sum," etc.) See also to same effect Mason *v.* Pritchard, 2 Camp. 436; Barton *v.* Bennett, 3 Camp. 220; Gates *v.* McKee, 3 Kern. 237.

[3] Draper *v.* Snow, 20 N. Y. 331; Bickford *v.* Gibbs, 8 Cush. 184; Snively *v.* Johnson, 1 Watts & S. 309; Campbell *v.* Knapp, 15 Pa. St. 27; Gillighan *v.* Boardman, 29 Me. 79; Colburn *v.* Averill, 30 Me. 310; Park-

the principal contract is made, the guaranty must be supported by a new and independent consideration,[1] unless it was given subsequently, in pursuance of a contemporaneous agreement to that effect.[2]

§ 418. **How affected by the statute of frauds.** — One of the provisions of the statute of frauds is that "no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, unless the agreement upon which such action shall be in writing," etc. The general conclusion from this provision is that a guaranty, which is a promise to answer for the debt of another, must be in writing and signed by the party to be charged therewith. But there are several minor questions which in this connection require explanation: *In the first place*, is it necessary for the guaranty to contain an acknowledgment and statement of the consideration? On the ground that the consideration is a part of the agreement it has been held that it should be expressed in the writing, in order to satisfy the requirement of the statute.[3] But the word "agreement" is held by other authorities to mean the thing agreed upon, and not to include every term or pro-

hurst *v.* Vail, 73 Ill. 323; Manrow *v.* Durham, 3 Hill, 584; Leggett *v.* Raymond, 6 Hill, 639; Hopkins *v.* Richardson, 9 Gratt. 494.

[1] Tenney *v.* Prince, 4 Pick. 385; Howe *v.* Merrill, 5 Cush. 80; Klein *v.* Currier, 14 Ill. 237; Parkhurst *v.* Vail, 73 Ill. 323. See Green *v.* Shepherd, 5 Allen, 570; Williams *v.* Williams, 67 Mo. 667; Ewing *v.* Clarke, 8 Mo. App. 570.

[2] Hawkes *v.* Phillips, 7 Gray, 284; Moies *v.* Bird, 11 Mass. 436.

[3] Wain *v.* Walters, 5 East, 10; Henderson *v.* Johnson, 6 Ga.—; Rigby *v.* Norwood, 34 Ala. 129; Sears *v.* Brink, 3 Johns. 210; Jenkins *v.* Reynolds, 3 Brod. & Bing. 14; Newbury *v.* Armstrong, 6 Bing. 201; Leonard *v.* Vredenburg, 8 Johns. 29; Saunders *v.* Wakefield, 4 Barn. & Ald. 595; Ordeman, Lawson, 49 Md. 135; Morley *v.* Boothby, 3 Bing. 107; Elliott *v.* Giese, 7 Harris & J. 457; Alnutt *v.* Asherden, 5 Man. & G. 392; Simmons *v.* Steele, 36 N. H. 73; Nichols *v.* Allen, 23 Minn. 543; Parry *v.* Spkes, 49 Wis. 385.

vision of the contract. Hence, these cases hold that it is not necessary to express the consideration in the writing.[1] But even when it is held that the consideration must appear in the writing, it is never held that it must be stated at length, with a full explanation of particulars. The rule is satisfied, if the consideration appears in the writing by reasonable intendment.[2]

In New York, it was formerly held to be unnecessary to state the consideration in the written guaranty;[3] but subsequently, the statute was amended in that State, so as to require the consideration to be expressed in writing, and it is now accordingly required to be in writing; whether the guaranty, being contemporaneous, is based upon the same consideration, or, being subsequent, it is supported by an independent consideration.[4]

Where the statute only requires the "promise" to be in writing, the consideration need not be expressed.[5]

In the second place, in those States where the consideration is not required to be expressed, it is held that the mere

[1] Packard *v.* Richardson, 17 Mass. 22; Gilligham *v.* Boardman, 29 Me. 79; Reed *v.* Evans, 17 Ohio, 128; Ashford *v.* Robinson, 8 Ired. 114; Little *v.* Nabb, 10 Mo. 3; Smith *v.* Ide, 3 Vt. 390; Sage *v.* Wilcox, 6 Conn. 81; Buckley *v.* Beardsley, 2 South. 570; Wren *v.* Pierce, 4 Sm. & M. 91.

[2] Russell *v.* Moseley, 3 B. & B. 210 ("I hereby guarantee the present account of Miss H. M. due to B. & Co., of £112, 4, 4, and what she may contract from this date to 30th of September, next"); Shortrede *v.* Cheek, 1 Ad. & El. 57; Emmatt *v.* Kearns, 5 Bing. N. C. 559; Haigh *v.* Brooks, 10 Ad. & El 309.

[3] Leonard *v.* Vredenburgh, 8 Johns. 29; Barley *v.* Freeman, 11 Johns. 221; Nelson *v.* Dubois, 13 Johns. 175.

[4] Brewster *v.* Silence, 11 Barb. 144; 4 Seld. 207; Glen Cove Mut. Ins. Co. *v.* Harrold, 20 Barb. 298; Draper *v.* Snow, 20 N. Y. 331. But the consideration need not be minutely or specifically defined; the words "value received" being held a sufficient compliance with the statute. Brewster *v.* Silence, *supra;* Douglass *v.* Howland, 24 Wend. 35; Watson *v.* McLaren, 26 Wend. 425.

[5] Violett *v.* Patten, 5 Cranch, 142; Taylor *v.* Ross, 3 Yerg. 330; Colgin *v.* Henley, 6 Leigh, 85; Pearce *v.* Wren, 4 Sm. & M. 91.

signature of the guarantor on some part of the principal obligation is a sufficient compliance with the statute of frauds, as, for example, where one not a payee or indorsee writes his name on the back of commercial paper.[1]

Finally, in order that the requirement of the statute should apply, the agreement must in fact, as well as in form, be a promise to answer for the debt of *another*. If the transaction be nothing more than an indirect way of guaranteeing the payment of one's debt, it need not be reduced to writing. Thus, if one, in paying his own debt, transfers to his creditor the note of another which is payable to himself, with a guaranty that this third person's note will be paid, the guaranty is substantially that the guarantor's original debt will be paid by the collection of this third person's note; and, for this reason, the guaranty need not be in writing.[2]

§ 419. **Negotiability of guaranties.** — In determining whether the guaranty of a commercial instrument is so far negotiable as to enable any subsequent indorsee or holder to sue on it, we find a contrariety of opinion on all points, except one. It is very generally agreed that where the guaranty is written on a separate paper, it will not be negotiable, so far as to pass as appurtenant of the bill or note to a sub-

[1] Perkins *v.* Catlin, 11 Conn. 213; Moies *v.* Bird, 11 Mass. 436; Nelson *v.* Dubois, 13 Johns. 175. But this doctrine is not universally accepted, many cases holding that in every case of guaranty there must be something more in writing than the signature of the party to be charged. See *ante*, §270 271, in the chapter on Transfer by Indorsement.

[2] Brown *v.* Curtis, 2 N. Y. 225. See to same effect Cardell *v.* McNiell, 21 N. Y. 336; Beaty *v.* Grim, 18 Ind. 131; Dyer *v.* Gilson, 16 Wis. 557; Thurston *v.* Island, 6 R. I. 103; Hall *v.* Rodgers, 7 Humph. 536; Johnson *v.* Gilbert, 4 Hill, 178; Sheldon *v.* Butler, 24 Minn. 513; Fowler *v.* Clearwater, 35 Barb. 143; Dauber *v.* Blackney, 38 Barb. 432; Meech *v.* Smith, 7 Wend. 315; Milks *v.* Rich, 80 N. Y. 269; Hunt *v.* Adams, 5 Mass. 358; Malone *v.* Keener, 44 Pa. St. 107; Huntington *v.* Wellington, 12 Mich. 10; Hopkins *v.* Richardson, 9 Gratt. 485; Rowland *v.* Rorke, 4 Jones (N. C.), 337.

sequent holder, unless the words of negotiability are incorporated in the guaranty.[1]

When the guaranty is written upon the negotiable instrument contemporaneously with its execution, the authorities are divided, some holding it to be negotiable,[2] and others claiming that it is not negotiable.[3] So, also, where the guaranty is written on the paper by a transferrer in the act of transferring it, some of the authorities hold the guaranty to be negotiable,[4] and others that it is not.[5]

[1] McLaren *v.* Watson's Exrs., 19 Wend. 559; *s. c.* 26 Wend. 425; 2 Am. Lead. Cas. 314; Story on Notes, § 484. But see, dissenting opinion of Verplanck, Senator, in McLaren *v.* Watson's Exrs., *supra*.

[2] Cooper *v.* Dedrick, 22 Barb. 516; McLaren *v.* Watson's Exrs. 26 Wend. 430; Webster *v.* Cobb, 17 Ill. 466; Cole *v.* Merchant's Bank, 60 Ind. 350; Story on Bills, § 458: "With a view to the convenience and security of merchants, as well as the free circulation and credit of negotiable paper, it would seem that such a guaranty upon the face of a bill of exchange, not limited to any particular person, but purporting to be general, without naming any person, whatsoever, or purporting to be a guaranty to the payee or his order, or to the bearer, ought to be held, upon the very intention of the parties, to be a complete guaranty to every successive person who shall become the holder of the bill."

[3] True *v.* Fuller, 21 Pick. 140; Tinker *v.* McCauley, 3 Mich. 188, overruling Higgins *v.* Watson, 1 Mich. 420; Small *v.* Sloan, 1 Bosw. 353; Northumberland Co. Bank *v.* Eger, 58 Pa. St. 97. Prof. Parsons (2 N. & B. 133, 134) says: "The negotiability of paper payable to order is established by a very peculiar exception to the general law of contracts; and this exception rests upon a usage so ancient and universal as to show a distinct and urgent need of it. But the negotiability of a guarantor has no such usage in its favor, and is not, therefore, within the exception. Moreover, we do not think it likely to be brought within this usage, or on other grounds established by adjudication, because all exceptions are to be limited by the necessity for them; and we see no necessity for any such rule, inasmuch as all the good which could be gained from making guaranties negotiable may be derived, and is in part derived, from the practice and the law of indorsement."

[4] Gage *v.* Mechanics' Bank, 79 Ill. 62; Partridge *v.* Davis, 20 Vt. 500; Heard *v.* Dubuque Co. Bank, 8 Neb. 16; Robinson *v.* Lain, 31 Iowa, 9. See Deck *v.* Works, 57 N. Y. Pr. 292; Johnson *v.* Mitchell, 50 Tex. 212; Heaton *v.* Hulbert, 3 Scam. 489.

[5] Trust Co. *v.* National Bank, 101 U. S. 70; Snevily *v.* Ekel, 1 Watts

It is to be observed, however, even where the guaranty is held to be non-negotiable, the guarantee may expressly assign the right of action on the guaranty to the transferee of the guaranteed paper; and such assignee can thereafter maintain action upon the guaranty in the name of the assignor, at common law, and in his own name under modern rules of procedure.[1]

§ 420. **Notice of acceptance of guaranty.** — Like every other contract, the guaranty is not complete, until there has been an acceptance, and the guarantor has been notified of the acceptance. If the negotiations are conducted by the principals and personally, there is no need of any formal notification of acceptance, since the acceptance is necessarily communicated to the guarantor, when it occurred.[2] And this is also true where the guaranty relates to only one specific liability.[3] But when the guaranty relates to a future continuing credit, the rule is laid down as follows: If the party distinctly and absolutely guarantees a certain line of credit, it presupposes some sort of a proposition for a guaranty, emanating from the guarantee, and for this reason, no formal acceptance by the guarantee is necessary; but if it be only a proposition to guarantee the credits, and not a positive promise to guarantee them, the acceptance of the proposition must be communicated, before the guar-

& S. 203; Miller *v.* Gaston, 2 Hill, 188; Lamourieux *v.* Hewitt, 5 Wend. 307; Tuttle *v.* Bartholomew, 12 Met. 454; Belcher *v.* Smith, 7 Cush. 482; Taylor *v.* Binney, 7 Mass. 481; Nevins *v.* Bank of Lansingburgh, 10 Mich. 547; Omaha Nat. Bank *v.* Walker, 5 Fed. Rep. 399. But in those cases where the guaranty itself is held to be not transferable, the writing is nevertheless held to operate as a transfer of the negotiable instrument. Myrick *v.* Hasey, 27 Me. 12; Upham *v.* Prince, 12 Mass. 15.

[1] Arents *v.* Commonwealth, 18 Gratt. 770; Story on Bills, § 457.

[2] Lent *v.* Padelford, 10 Mass. 230; Walker *v.* Forbes, 25 Ala. 139; Wildes *v.* Savage, 1 Story, 22.

[3] Montgomery *v.* Kellogg, 43 Miss. 486; Thrasher *v.* Ely, 2 Sm. & M. 147.

antor can be held liable on it.[1] A notice of acceptance is always necessary, where the guaranty takes the form of a general letter of credit, addressed to whom it may concern, so as to enable the guarantor to know who has become the guarantee.[2]

The guarantor may, in the guaranty, waive notice of acceptance, and in that case notice may be dispensed with.[3]

§ 421. **Necessity for demand of principal and notice of default to guarantor.** — The authorities are agreed that, where the liability of the guarantor depends upon a contingency, it is necessary that notice of default should be given to the guarantor within a reasonable time after demand; and demand should be made of the principal at or very soon after maturity.[4]

But where the guaranty is absolute, the authorities are

[1] Jackson *v.* Yendes, 7 Blackf. 526; Sheurll *v.* Knox, 1 Dev. 404; 2 Am. Lead. Cas. 104; Davis *v.* Wells, Fargo & Co., 104 U. S. 159; *s. c.* 2 Utah, 411; Norton *v.* Eastman, 4 Me. 521; Tuckerman *v.* French, 7 Me. 115; Bradley *v.* Carey, 8 Me. 234; Babcock *v.* Bryant, 12 Pick. 133; Mussey *v.* Rayner, 12 Pick. 223; Lawson *v.* Townes, 2 Ala. 373; Walker *v.* Forbes, 25 Ala. 139; Taylor *v.* Wetmore, 10 Ohio, 490 (overruled by powers *v.* Bumcranz, 12 Ohio St. 284); Rapelye *v.* Bailey, 3 Conn. 438; Craft *v.* Isham, 13 Conn. 28; Kay *v.* Allen, 9 Barr. 320. See Montgomery *v.* Kellogg, 43 Miss. 486; Kincheloe *v.* Holmes, 7 B. Mon. 5; Lowe *v.* Beckwith, 14 B. Mon. 184; Hill *v.* Calvin, 4 How. (Miss.) 231; Rankin *v.* Childs, 9 Mo. 674; Central Sav. Bank *v.* Shine, 48 Mo. 461; Oaks *v.* Miller, 13 Vt. 106; Lowry *v.* Adams, 22 Vt. 166 (overruling Train *v.* Jones, 11 Vt. 44). But see *contra* Douglass *v.* Howland, 24 Wend. 50; Powers *v.* Bumcranz, 12 Ohio St. 284; Smith *v.* Dann, 6 Hill, 543; Caton *v.* Shaw, 2 H. & Gill, 13; Wilcox *v.* Draper, 12 Neb. 138.

[2] Russell *v.* Clarke, 7 Cranch, 69; Edmundson *v.* Drake, 5 Pet. 624; Douglass *v.* Reynolds, 7 Pet. 113; Adams *v.* Jones, 12 Pet. 207; Lee *v.* Dick, 10 Pet. 482; Louisville Man. Co. *v.* Welch, 10 How. 461; Widdes *v.* Savage, 1 Story C. C. 22.

[3] Bickford *v.* Gibbs, 8 Cush. 154; Worcester Inst., etc., *v.* Davis 13 Gray, 531; Wadsworth *v.* Allen, 8 Gratt. 174.

[4] Clay *v.* Edgerton, 19 Ohio St. 553; Dickerson *v.* Derrickson, 39 Ill. 577; Montgomery *v.* Kellogg, 43 Miss. 486.

divided, some holding that the guarantor's liability becomes absolute at maturity, without any demand on the principal or notice of default to himself;[1] and others claiming that in order to make sure of the liability of the guarantor in any case, demand must be made of the principal, and notice of default sent to the guarantor, within a reasonable time after maturity.[2]

But this requirement of demand and notice is never considered an absolute condition precedent to the liability of the guarantor. The guarantor is discharged from liability, on account of the failure of demand and notice, only when such failure results in some loss or damage to the guarantor, which he could have avoided, had he received notice of the principal's default within a reasonable time after maturity. If he has sustained no loss, he is liable, notwithstanding the failure of demand and notice. For example, the guarantor is liable, notwithstanding the want of notice, if the principal was insolvent at and before maturity of the paper, because the law presumes that the guarantor suffers nothing in such a case.[3]

[1] Brown *v.* Curtis, 2 N. Y. 228; Allen *v.* Rightmere, 20 Johns. 366; Heaton *v.* Hulbert, 3 Scam. 490; Voltz *v.* Harris, 40 Ill. 159; Wright *v.* Dyer, 48 Mo. 526; Breed *v.* Hillhouse, 7 Conn. 523; Read *v.* Cutts, 7 Greenl. 186.

[2] Douglas *v.* Reynolds, 7 Pet. 126; 12 Pet. 523; Oxford Bank *v.* Haynes, 8 Pick. 423; Talbot *v.* Gay, 18 Pick. 535; Newton Wagon Co. *v.* Diers, 10 Neb. 285; Second Nat. Bank *v.* Gaylord, 34 Iowa, 248; Rodabaugh *v.* Pitkin, 46 Iowa, 545; Cannon *v.* Gibbs, 9 Serg. & R. 202.

[3] Reynolds *v.* Douglas, 12 Pet. 523; Wilder *v.* Savage, 1 Story, 22; Van Wart *v.* Woolley, 3 B. & C. 439; Bashford *v.* Shaw, 4 Ohio St. 263; Hance *v.* Miller, 21 Ill. 636; Rhett *v.* Poe, 2 How. 457. See Dickerson *v.* Derrickson, 39 Ill. 577; Voltz *v.* Harris, 40 Ill. 155; Fuller *v.* Scott, 8 Kan. 33; Farmer's, etc., Bank *v.* Kercheval, 2 Mich. 504. On the other hand, damage will be presumed from the fact that the principal was solvent at maturity, and became insolvent before demand and notice of default. Oxford Bank *v.* Haynes, 8 Pick. 423; Talbot *v.* Gay, 18 Pick. 534; Beeker *v.* Saunders, 6 Ired. 380; Woodson *v.* Moody, 4 Humph. 303; Mayberry *v.* Boynton, 2 Harr. 24.

The want of demand and notice may always be waived by the guarantor,[1] and it is always presumed to be waived by a subsequent promise to pay the debt.[2]

§ 422. **Concealed sureties as accommodation parties — Nature of their liability. — Admissibility of parol evidence to prove real character.** — If the accommodation party to commercial paper affixes the word "surety" to his signature, he must undoubtedly be treated as surety by all the subsequent holders of the paper, as well as by the original parties to the paper.[3] And so, also, will one be treated by all as principal, who describes himself as such in his signature.[4] But where the party signing does not expressly indicate in what character he does sign, the authorities are divided as to what is the proper construction to be placed upon his relation to the other parties. The English rule is that where one who appears as a principal party is surety for another, who appears to be a secondary party, drawer or indorser, this fact may be shown by parol evidence, and the party who is in fact a surety will be entitled to all the rights and privileges of a surety, as against any holder who knew the fact. This is the equitable rule, enforced in all the English courts, in which equitable pleas are admissible;[5] but, according to the

[1] Wadsworth *v.* Allen, 8 Gratt. 174; Bickford *v.* Gibbs, 8 Cush. 154; Worcester Co. Inst., etc., *v.* Davis, 13 Gray, 531.

[2] Reynolds *v.* Douglas, 12 Pet. 523; Louisville Man. Co. *v.* Welsh, 10 How. 476; Sigourney *v.* Wetherell, 6 Met. 563.

[3] Hunt *v.* Adams, 5 Mass. 358; Robison *v.* Lyle, 10 Barb. 512; Sayles *v.* Sims, 73 N. Y. 552, the last case holding that, where there are three joint makers, and one signs his name as surety, he is presumed to be surety for the other two, in the absence of evidence to the effect that one of the remaining two is also a surety for the third.

[4] Sprigg *v.* Bank of Mount Pleasant, 10 Pet. 265.

[5] Erwin *v.* Lancaster, 6 Best & S. Q. B. 572; Hollier *v.* Eyre, 9 Cl. & F. 1, 45; Pooley *v.* Harradine, 7 E. & B. 431, 435; Strong *v.* Foster, 17 C. B. 201; Taylor *v.* Burgess, 5 H. & N. 1; 2 E. & E. 424, 429; Bailey *v.* Edwards, 4 B. & S. 761.

common-law rule, as laid down by Lord Mansfield, the parties to commercial paper sustain the liabilities and enjoy the privileges and rights, which are incident to their ostensible characters, and no others. According to this rule, it is not permitted to show by parol evidence that the drawer or indorser is the principal debtor, and that the maker or acceptor is the accommodation party or surety, in order to bind the subsequent holder, who knows the fact.[1]

In the United States, a few highly respectable authorities have adopted the English equitable rule.[2] But the weight of authority in this country favors the English common-law rule.[3] The principal reason for holding to the common-law rule is, that the party who is ostensibly the primary debtor can always protect himself against any act of indulgence to the ostensibly secondary, but actually primary obligor, by paying the debt himself, and recovering the sum so paid of the real primary debtor.[4]

[1] Fentum *v.* Pocock, 5 Taunt. 192; 1 Marsh, 14; Carstairs *v.* Rolleston, 5 Taunt. 551; 1 Marsh, 257; Nichols *v.* Norris, 3 Barn. & Ad. 41; Price *v.* Edmunds, 10 B. & C. 578; Rolfe *v.* Wyatt, 5 C. & P. 181; Harrison *v.* Cortauld, 3 Barn. & Ad. 37.

[2] Guild *v.* Butler, 127 Mass. 386; Meggett *v.* Baum, 57 Miss. 22.

[3] Farmers', etc., Bank *v.* Rathbone, 26 Vt. 19; Stephens *v.* Monongahela, 88 Pa. St. 157; White *v.* Hopkins, 3 Watts & S. 101; Murray *v.* Judah, 6 Cow. 484; Yates *v.* Donaldson, 5 Md. 389; Gano *v.* Heath, 36 Mich. 441; Hansborough *v.* Gray, 3 Gratt. 356; Stiles *v.* Eastman, 1 Kelly, 205; Summerhill *v.* Tapp, 52 Ala. 227; Bank of Montgomery *v.* Walker, 9 Serg. & R. 229; *s. c.* 12 Serg. & R. 382; Lewis *v.* Hanchman, 2 Barr. 416; Clopper's Admr. *v.* Union Bank, 7 Har. & J. 92; Lambert *v.* Landford, 2 Blackf. 137; Cronise *v.* Kellogg, 20 Ill. 13. See Parks *v.* Ingram, 22 N. H. 283; Adle *v.* Metroger, 1 La. Ann. 254.

[4] Story says that the "strong tendency of the more recent authorities is to hold that, in all cases, the holder has a right to treat all the parties to a note as liable to him exactly to the same extent, and in the same manner, whether he knows or not the note to be an accommodation note; for, as to him, all the parties agree to hold themselves primarily or secondarily liable, as they stand on the note; and that they are not at liberty, as to him, to treat their liability as at all affected by an accommodation between themselves." Story on Promissory Notes, § 418.

But where there are two or more joint promisors of a promissory note, who sign ostensibly as joint principals, a different phase of the same question is presented, viz.: whether it can be shown by parol evidence that one of them is surety, and has the privileges of a surety as against any holder who knows his real character. Here, the admission of parol evidence to prove this fact would not result in reversing the ostensible relations of the parties, making the apparent obligor a secondary obligor, and the apparent secondary obligor primary. As to the substantial claims of the holder, there would be no change in consequence of the proof of the real relation between the primary obligors. The only difference would be that the holder cannot, after learning that one of the parties is a surety, do anything to the prejudice of the surety. In England the common-law rule excludes the parol evidence,[1] while the equity rule admits it.[2] In the United States the weight of authority is in favor of the English equity rule, and admits parol evidence to show that a joint promisor is in fact a surety.[3]

§ 423. **What acts will discharge guarantors and sureties.** — *In the first place*, whatever discharges the prin-

[1] Price *v.* Edmunds, 10 B. & C. 578; Manley *v.* Boycott, 2 El. & B. 46; Perfect *v.* Murgrave, 6 Price, 111; Rees *v.* Berrington, 2 Ves. Jr. 540.

[2] Davies *v.* Stainback, 6 D. G. M. & G. 679; Greenough *v.* McClelland, 30 L. J. Q. B. 15; Hollier *v.* Eyre, 9 Cl. & F. 45; Pooley *v.* Harradine, 7 El. & B. 431. And the later authorities maintain that the surety is discharged if the holder knew of the relation of suretyship when he granted an indulgence to the principal debtor. Baily *v.* Edwards, 4 Best & S. Q. B. 761; Ewin *v.* Lancaster, 6 Best & S. Q. B. 572; Swire *v.* Redman, 1 Q. B. Div. 536.

[3] Hubbard *v.* Gurney, 64 N. Y. 460; Sayles *v.* Sims, 73 N. Y. 552; Grafton Bank *v.* Kent, 4 N. H. 221; Irvine *v.* Adams, 48 Wis. 468; Rose *v.* Williams, 5 Kan. 489; Garrett *v.* Ferguson, 9 Mo. 125; Stillwell *v.* Aaron, 69 Mo. 539; Barron *v.* Cady, 40 Mich. 259; Perry *v.* Hadnett, 38 Ga. 104; Harmon *v.* Hale, 1 Wash. Ter. 423; Wheat *v.* Kendall, 6 N. H.

cipal will discharge the guarantor or surety, whether that discharge arises from payment or release,[1] or in any other way.[2] Illegality of the note or bill will ordinarily discharge both principal and surety; [3] but if the invalidity of the note is on account of the principal's disability as a married woman, the surety is nevertheless bound, if his signature has not been procured through fraud.[4]

For the reasons heretofore explained the discharge of a prior indorser works a discharge of the subsequent indorsers, but the discharge of a subsequent indorser has no effect upon a prior indorser.[5]

In the second place, if the surety has been induced to sign by any misrepresentation, fraud or duress, the surety will be discharged as to parties guilty of these offenses.[6]

In the third place, any diversion of the paper from its in-

504; Branch Bank *v.* James, 9 Ala. 94. But see *contra* Claremont Bank *v.* Wood, 10 Vt. 582; Dunham *v.* Downey, 31 Vt. 249; Benedict *v.* Cox, 52 Vt. 250.

[1] Broadway Sav. Bank *v.* Schmucker, 7 Mo. App. 171; Eggemann *v.* Henschen, 56 Mo. 123; Cowper *v.* Smith, 4 M. & W. 519. But this would not be the case, where in the release there is an express reservation of the holder's rights of action against the secondary obligors, for there would be in such a case an implied reservation of their remedies against the primary debtor. Gloucester Bank *v.* Worcester, 10 Pick. 528; Stewart *v.* Eden, 2 Cai. 121; Tombeckbe Bank *v.* Stratton, 7 Wend. 429.

[2] Sargent *v.* Appleton, 6 Mass. 85; Couch *v.* Waring, 9 Conn. 261.

[3] Griffith *v.* Sitgreaves, 90 Pa. St. 161; Gill *v.* Morris, 11 Heisk. 614; Putnam *v.* Schuyler, 4 Hun, 168.

[4] Jones *v.* Crosthwaite, 17 Iowa, 393; Allen *v.* Berryhill, 27 Iowa, 531; Davis *v.* Staaps, 43 Ind. 103; Hicks *v.* Randolph, 3 Baxter, 352; Osborn *v.* Robbins, 36 N. Y. 365.

[5] Newcomb *v.* Raynor, 21 Wend. 108; English *v.* Darley, 2 Bos. & P. 61; Bank of U. S. *v.* Hatch, 6 Pet. 250; Lynch *v.* Reynolds, 16 Johns. 41; Claridge *v.* Dalton, 4 M. & S. 232; Smith *v.* Knox, 3 Esp. 46; White *v.* Hopkins, 3 Watts. & S. 99.

[6] Hamilton *v.* Watson, 12 Cl. & F. 109; Anderson *v.* Warne, 11 Ill. 20; Solser *v.* Brock, 3 Ohio St. 302; Melick *v.* First Nat. Bank, 52 Iowa, 94; Harris *v.* Brooks, 21 Pick. 122.

tended use[1] or alteration of its terms will likewise discharge the surety.[2]

§ 424. — **Surrender of securities and extension of time of payment.** — *In the fourth place*, the surety is also discharged where the interests of the surety have been changed or damaged by the surrender of securities for the debt, or by extension of time of payment. The sureties are entitled, under the principle of subrogation, to all the securities and all the remedies which the creditor could have enforced against the debtor.[3] But the creditor is under no obligation to make use of the remedies against the debtor; and his delay to prosecute the debt, however much prolonged, provided it be not for the statutory period of limitation, would not involve any violation of the rights of the sureties.[4] In the absence of statute, the surety cannot compel the creditor to bring suit against the debtor.[5] And it is even permissible for the creditor to discontinue proceedings already begun against the debtor, without affecting the

[1] Dewey *v.* Cochrane, 4 Jones 184; Southerland *v.* Whitaker, 5 Jones, 5; 1 Parsons N. & B. 236.

[2] As to effect of alterations see chapter on Forgeries and Alterations.

[3] Williams *v.* Price, 1 Sim. & St. 581; King *v.* Baldwin, 2 Johns. Ch. 317; Hayes *v.* Ward, 4 Johns. Ch. 123; Smith *v.* Jay, 23 Vt. 656; Hurd *v.* Spencer, 40 Vt. 581; Treanor *v.* Yingling, 37 Md. 491; Ex parte Mure, 1. Coxe, 93; Humphrey *v.* Hitt, 6 Gratt. 509; Sullivan *v.* Morrow, 4 Ind. 425; Kirkpatrick *v.* Hawke, 80 Ill. 122; Dillon *v.* Russell, 5 Neb. 484; Muirhead *v.* Kirkpatrick, 9 Harris, 237.

[4] Page *v.* Webster, 15 Me. 249; Berry *v.* Pullen, 69 Me. 101; Veazie *v.* Carr, 3 Allen, 14; Powell *v.* Waters, 17 Johns. 176; Bank of S. C. *v.* Meyers, 1 Bailey, 412; Freeman's Bank *v.* Rollins, 13 Me. 202; English *v.* Darley, 2 B. & P. 61; Wood *v.* Jefferson Cow. Bank, 9 Co. 194; Sterling *v.* Marietta Co., 11 Serg. & R. 179; Worsham *v.* Goar, 4 Port. (Ala.) 441.

[5] Croughton *v.* Duvall, 3 Call, 73; Humphrey *v.* Hitt, 6 Gratt 509. In New York, the surety, who is a joint-maker or promisor, is discharged if the creditor does not sue the debtor within a reasonable time, and the debtor becomes insolvent in the meanwhile. Pain *v.* Packard, 13 Johns. 174; 17 Johns. 384.

liability of the surety.[1] But while the surety cannot compel the creditor to do anything affirmatively for his benefit, he will be discharged if there is any surrender of securities, such as a pledge or mortgage, a judgment lien or levy,[2] or any extension of time or forbearance of suit, which is binding upon the creditor, and which consequently deprives the surety of his right to sue the principal.

But in order that the indulgence may work a discharge of the surety, it must rest upon a binding contract, which presupposes a sufficient consideration. Without a consideration the promise to forbear is not binding on the creditor, and hence does not discharge the surety.[3] Any valuable, independent consideration will be sufficient to make the agreement binding. The promise of an usurious premium is held to be sufficient, where it has been executed by payment and forbearance;[4] but not where the promise is still

[1] Bellows *v.* Lovell, 5 Pick. 307; Commissioners *v.* Ross, 3 Bin. 250; Montpelier Bank *v.* Dixon, 4 Vt. 399; Lawson *v.* Sayder, 1 Md. 171, Withdrawal of execution before a levy is permissible. Lenox *v.* Prout, 3 Wheat. 520; M'Kenny *v.* Waller, 1 Leigh, 434; Morrison *v.* Hartman, 2 Harris, 416; Humphrey *v.* Hitt, 6 Gratt. 509; Alcock *v.* Hill, 4 Leigh, 622; Sawyer *v.* Bradford, 6 La. 572. Discontinuance of steps to foreclose a mortgage. Butter *v.* Gambs. 1 Mo. App. 466. Failure to revive judgment. United States *v.* Simpson, 3 Pa. 437; Farmers' Bank *v.* Reynolds, 13 Ohio, 84.

[2] Farmers' Bank *v.* Reynolds, 13 Ohio, 84; Ferguson *v.* Turner, 7 Mo. 497; Mayhew *v.* Crickett, 2 Swans. 193; Woodward *v.* Walton, 7 Heisk. 50; Commonwealth *v.* Haas, 16 Serg. & R. 252; Mayhew *v.* Boyd, 5 Md. 102; Sneed, *v.* White, 3 J. J. Marsh. 525; Winston *v.* Yeargin, 50 Ala. 340; Clopton *v.* Spratt, 52 Miss. 251; Case *v.* Hawkins, 53 Miss. 702. Neglect to record a mortgage, where such failure destroys its value. Barr *v.* Boyer, 2 Neb. 265.

[3] McLemore *v.* Powell, 12 Wheat. 554; Crawford *v.* Millspaugh, 13 Johns. 87; Galbraith *v.* Fullerton, 53 Ill. 126; Buckalew *v.* Smith, 44 Ala. 638; Aud *v.* Magruder, 10 Cal. 282; Parkhurst *v.* Vail, 73 Ill. 343; Bank of Utica *v.* Ives, 17 Wend. 501; Davis *v.* Graham, 29 Iowa, 514; Payne *v.* Commercial Bank, 6 Sm. & M. 24; Hazard *v.* White, 26 Ark. 155; Ex parte Balch, 2 Low. 440.

[4] Whittemore *v.* Ellison, 72 Ill. 301; Scott *v.* Harris, 76 N. C. 205 (36

executory.[1] So, also, will the surety be discharged, where the promise to forbear rests upon the giving of a bonus, in the shape of an increased rate of interest,[2] or the payment of a regular rate in advance.[3] Whether an agreement to pay the same rate of interest would be a sufficient consideration has been decided both in the affirmative[4] and in the negative.[5] Part payment is also insufficient.[6]

Am. Rep. 871); Billington *v.* Wagoner, 33 N. Y. 31; Kyle *v.* Bostwick, 10 Ala. 589; Harbert *v.* Dumont, 3 Ind. 346; Redman *v.* Deputy, 26 Ind. 338; Cross *v.* Wood, 30 Ind. 378; Abel *v.* Alexander, 45 Ind. 523; Armistead *v.* Ward, 2 Pat. & H. 504; Hamilton *v.* Prouty, 50 Wis. 592; Austin *v.* Dorwin, 21 Vt. 38; People's Bank *v.* Pearson, 30 Vt. 711; Miller *v.* McCann, 7 Paige, 451; Vilas *v.* Jones, 10 Paige, 76.

[1] McComb *v.* Kittridge, 14 Ohio, 348; Braman *v.* Hawk, 1 Blackf. 392; Naylor *v.* Moody, 3 Blackf. 92; Coman *v.* The State, 4 Blackf. 241; Meiswinkle *v.* Jung, 30 Wis. 361; Church *v.* Maloy, 70 N. Y. 63; Smith *v.* Hyde, 36 Vt. 306; Burgess *v.* Dewey, 36 Vt. 618; Vilas *v.* Jones, 1 N. Y. 274; Halstead *v.* Brown, 17 Ind. 202; Abel *v.* Alexander, 45 Ind. 523; St. Maries *v.* Polleys, 47 Wis. 78; Tudor *v.* Goodloe, 1 B. Mon. 324; Scott *v.* Hall, 6 B. Mon. 127; Patton *v.* Shanklin, 14 B. Mon. 17; Irvine *v.* Adams, 48 Wis. 468. But see *contra* Corielle *v.* Allan, 13 Iowa, 289; Smith *v.* Pearson, 52 Cal. 611; Armistead *v.* Ward, 3 Pat. & H. 504; Wheat *v.* Kendall, 6 N. H. 504. See Oates *v.* National Bank, 100 U. S. 248.

[2] Kittle *v.* Wilson, 7 Neb. 84. But the surety is not discharged where the increased interest, or other bonus, is by statute, or by agreement, applied as part payment of original debt, since in such a case there is not actually, though ostensibly, any new consideration. Nightingale *v.* Meginnis, 34 N. J. 461; Schlussel *v.* Warren, 2 Ore. 18.

[3] 2 Hare & Wallace Lead. Cas. 469. But the promise to forbear will not be presumed from the payment in advance. First Nat. Bank *v.* Leavitt, 65 Mo. 563; St. Joseph F. & M. Ins. Co. *v.* Hauck, 71 Mo. 466. But see *contra* Crosby *v.* Wyatt, 10 N. H. 322. A note for the interest has the same effect as payment of it in advance. Gahn *v.* Niemcewicz, 11 Wend. 312.

[4] Chute *v.* Pattee, 37 Me. 102; Fawcett *v.* Freshwater, 31 Ohio St. 637 (overruling Jones *v.* Brown, 11 Ohio St. 601, and affirming McComb *v.* Kittridge, 14 Ohio, 348, which had been overruled by Jones *v.* Brown); Blazer *v.* Bundy, 15 Ohio St. 57; Wood *v.* Newkirk, 15 Ohio St. 295.

[5] Harter *v.* Moore, 5 Blackf. 367; Abel *v.* Alexander, 45 Ind. 523 (overruling Pierce *v.* Goldberry, 31 Ind. 52); Wilson *v.* Powers, 130 Mass. 127; Stuber *v.* Schack, 83 Ill. 192.

[6] Herbert *v.* Servin, 41 N. J. L. 225; Jenness *v.* Cutler, 12 Kan. 500;

In the next place, the agreement for indulgence must be absolute[1] and the time of forbearance definite. An indefinite forbearance does not so bind the creditor as to work a discharge of the sureties.[2] The shortness of the time does not matter if it is definite.[3] But it must be for a longer time than what is required to obtain judgment.[4] A promise to forbear for one of two periods in the alternative, is definite as to the shorter period and discharges the surety.[5] "Until after threshing" has been held to be sufficiently definite,[6] while "after harvest time," was elsewhere declared to be too indefinite to discharge the surety.[7]

It is hardly necessary to state that an unaccepted offer of forbearance to sue is insufficient.[8]

Here, as well as elsewhere, the surety and guarantor are only discharged when the indulgence or surrender of securities would result in injury to him if he is held bound;[9]

Royal *v.* Lindsay, 15 Kan. 291; Halderman *v.* Woodward, 22 Kan. 734; Prather *v.* Gannon, 25 Kan. 379; Andrews *v.* Hagadon, 54 Tex. 571; Carraway *v.* Odenhall, 56 Miss. 223. But see Jaffray *v.* Crane, 50 Wis. 349, where taking a note for part of a debt, the other part having been paid, was held to discharge the surety.

[1] As long as the condition of a conditional agreement to forbear is not performed, there is no forbearance, and consequently no discharge of the sureties. Hausberger *v.* Geiger, 3 Gratt. 144; Norris *v.* Cumming, 2 Rand. 323.

[2] Gardner *v.* Watson, 13 Ill. 347; Blackstone Bank *v.* Hill, 10 Pick. 133; Menifee *v.* Clark, 35 Ind. 304; Abel *v.* Alexander, 45 Ind. 523; Alcock *v.* Hill, 4 Leigh, 622; Miller *v.* Stern, 2 Pa. St. 286; Parnell *v.* Price, 3 Rich. 121.

[3] Fellows *v.* Prentiss, 3 Denio, 512; Smith *v.* Sheldon, 35 Mich. 42.

[4] Hallett *v.* Holmes, 18 Johns. 28; Sizer *v.* Peacock, 23 Wend. 81; Price *v.* Edmunds, 10 Barn. & C. 578; Isaac *v.* Daniel, 8 Ad. & El. (N. S.) 500; Lee *v.* Levi, 4 Barn. & C. 390; 1 C. & P. 553; Fentum *v.* Pocock, 5 Taunt. 192; Bank of U. S. *v.* Hatch, 6 Pet. 250.

[5] Scott *v.* Harris, 76 N. C. 205.

[6] Moulton *v.* Posten, 52 Wis. 169.

[7] Findley *v.* Hill, 8 Ore. 248.

[8] Badnall *v.* Samuel, 3 Price, 521; Hewet *v.* Goodrich, 2 C. & P. 468.

[9] Smith *v.* Harper, 5 Cal. 330.

in the latter case only to the extent of the securities which have been surrendered.[1] For the same reason, the surety is not discharged by an indulgence, if the remedies against the surety were expressly reserved, for the reservation of these remedies involves by necessary implication the reservation of the sureties' remedies against the principal.[2] So, also, will the surety be held bound, if the extension of time or surrender of securities had been done with the consent of the surety.[3]

It is, also, possible for a surety to waive a discharge by a subsequent acknowledgment or promise to pay, but whether with [4] or without [5] a new consideration, has been differently decided by the courts.

Finally, the agreement for indulgence must be made with the principal or his authorized agent, and not with some third party, acting independently of the principal;[6] the

[1] Loomis *v.* Fay, 24 Vt. 240; Neff's Appeal, 9 Watts & S. 36; Payne *v.* Commercial Bank, 6 Sm. & M. 24.

[2] Bouler *v.* Mayo, 19 C. B. (N. S.) 70; Ex parte Glendinning, 1 Buck, 517; Ex parte Gifford, 6 Ves. 807; Nichols *v.* Norris, 3 B. & Ad. 41; Wagman *v.* Hoag, 14 Barb. 233; Morse *v.* Huntington, 40 Vt. 488; Hagey *v.* Hill, 75 Pa. St. 108; Kenworthy *v.* Sawyer, 125 Mass. 28; Muir *v.* Crawford, 2 Scotch App. L. R. 456; Ex parte Carstairs, 1 Buck, 560; Kearsley *v.* Cole, 16 M. & W. 127; Boultbee *v.* Stubbs, 18 Ves. 20; Owen *v.* Homan, 3 Eng. L. & Eq. 125; Stewart *v.* Eden, 2 Cai. 121; Clagett *v.* Salmon, 5 Gill & J. 314; Viele *v.* Hoag, 24 Vt. 46. But see *contra* Gustine *v.* Union Bank, 10 Rob. (La.) 412; Harbert *v.* Dument, 3 Port. (Ind.) 246. Parol evidence is admissible to show that the agreement for indulgence was not intended to suspend the surety's remedies. Wyke *v.* Rogers, 1 DeG. M. & G. 408. But see 2 Daniel's Negot. Inst., § 1323.

[3] Gloucester Bank *v.* Worcester, 10 Pick. 528; Prouty *v.* Wilson, 123 Mass. 297; Bruen *v.* Marquand, 17 Johns. 58; Mayhew *v.* Crickett, 2 Swanst. 185; Ludwig *v.* Iglehart, 43 Md. 39; Norris *v.* Crummey, 2 Rand. 334; Hunter *v.* Jett, 4 Rand. 107; Smith *v.* Hawkins, 6 Conn. 444; Smith *v.* Winter, 4 M. & W. 454; Gray *v.* Brown, 22 Ala. 262; 1 Parsons' N. & B. 240; Clark *v.* Devlin, 3 Bos. & P. 363.

[4] N. H. Sav. Bank *v.* Colcord, 15 N. H. 119.

[5] Fowler *v.* Brooks, 13 N. H. 420; 1 Parsons' N. & B. 242.

[6] Frazer *v.* Jordan, 8 El. & Bl. 303; Lyon *v.* Holt, 5 M. & W. 543; Sterling *v.* Marietta, etc., Co., 11 Serg. & R. 179; 2 Parsons' N. & B. 241.

reason being that there is not privity of contract between the principal and the obligee of the contract, and consequently the creditor is at liberty to proceed with his remedies against the principal, although he would thereby subject himself to liability to the third party for the breach of the contract for extension of time or forbearance.

§ 425. **Presumption of indulgence, arising from receipt of securities.** — If the security is already due and collectible, when it is received by the creditor, or it becomes so before the maturity of the principal debt, no presumption of an agreement for delay can arise from the acceptance of the security because the reliance upon such security would not necessarily occasion delay in the enforcement of the principal debt.[1] And where there is neither a presumption of, nor an agreement for, delay, the mere acceptance of security does not affect the rights of the creditor against the surety.[2] But if the security falls due after the maturity of the principal debt, the necessary delay for securing satisfaction out of the security would raise the presumption of an agreement for extension of time; on the ground that "such indulgence may be, and is in most cases, the very consideration upon which the collateral security is given and obtained."[3]

[1] Crafts *v.* Beale, 11 C. B. 172 (2 Am. Lead. Cas. 273); Board of Education *v.* Fonda, 77 N. H. 362.

[2] Bank of Utica *v.* Ives, 17 Wend. 502; Cary *v.* White, 52 N. Y. 138; Andrews *v.* Marrett, 58 Me. 539; Lincoln *v.* Bassett, 23 Pick. 154; Sterling *v.* Marietta, etc., Co., 11 Serg. & R. 179; United States *v.* Hodge, 6 How. 279; Ripley *v.* Greenleaf, 2 Vt. 129; Suckley *v.* Furse, 15 Johns. 338; Twopenny *v.* Young, 3 Barn. & C. 208; Bedford *v.* Deakin, 2 B. & Ald. 210; Brengle *v.* Bushey, 40 Md. 141; Thompson *v.* Gray, 63 Me. 230; York *v.* Pierson, 63 Me. 587; Sigourney *v.* Wetherell, 6 Met. 553; Payne *v.* Commercial Bank, 6 Sm. & M. 24; Wade *v.* Staunton, 5 How. (Miss.) 631; Oxford Bank *v.* Lewis, 8 Pick. 458; Miller *v.* Knight, 6 Baxter, 503; Pring *v.* Clarkson, 1 Barn. & C. 14.

[3] Okis *v.* Spencer, 2 Whart. 253; Beard *v.* Root, 11 N. Y. S. C. (4

The acceptance of a second bill from the acceptor, after dishonor of the first, payable at some future time, would discharge the drawer and indorsers of the first bill, even though the latter is not surrendered up and cancelled.[1]

§ 426. **The remedies of the surety — Contribution.** The surety has three remedies for the protection of himself against loss: *First*, which is the most common remedy, he may pay the debt himself, and then recover it back from the principal.[2] But the surety cannot, by taking a transfer of the principal debt, recover its face value, irrespective of the amount he has actually paid. The obligation of the principal to the surety is one of indemnity, and the surety can only recover of the principal what he actually paid in liquidation or satisfaction of the principal's debt,[3]

Hun) 356; Hubbard *v.* Gurney, 64 N. Y. 460; Pomeroy *v.* Tanner, 70 N. Y. 547; Bangs *v.* Mosher, 23 Barb. 478; Fellows *v.* Prentiss, 3 Den. 512; Eisner *v.* Kelly, 3 Daly, 485; Michigan St. Bank *v.* Leavenworth, 28 Vt. 215 (overruling Ripley *v.* Greenleaf, 2 Vt. 129); Armistead *v.* Ward, 2 Pat. & H. 504; Meyers *v.* Willis, 5 Hill, 463; Couch *v.* Waring, 9 Conn. 264; Frois *v.* Mayfield, 33 Tex. 801.

[1] Kendrick *v.* Lomax, 2 Cromp. & J. 405. See Michigan St. Bank *v.* Leavenworth, 28 Vt. 215; Baker *v.* Walker, 14 M. & W. 464; Whitney *v.* Going, 20 N. H. 354; Austin *v.* Curtis, 31 Vt. 64. But see *contra* Pring *v.* Clarkson, 1 Barn. & C. 14; 2 Dow. & R. 78; followed in Galen *v.* Niemcewitz, 16 Johns. 321.

[2] Humphrey *v.* Hitt, 6 Gratt. 524; Story on Notes, § 419; Blow *v.* Maynard, 2 Leigh, 54; Kendrick *v.* Forney, 22 Gratt. 570; Pace *v.* Robertson, 65 N. C. 550; Burton *v.* Slaughter, 26 Gratt. 920; Pitt *v.* Pursord, 8 M. & W. 538; Smith *v.* Sheldon, 35 Mich. 42; Hall *v.* Smith, 5 How. 96; Edgerly *v.* Emerson, 23 N. H. 555; Hulett *v.* Soullard, 26 Vt. 296. But no action is maintainable, until the surety has actually paid the debt. Swift *v.* Crocken, 21 Pick. 241; and not before maturity of the debt, Parks *v.* Ingram, 22 N. H. 283.

[3] Delaware, etc., R. R. Co. *v.* Oxford Iron Co., 11 Stew. 151; Bonney *v.* Seely, 2 Wend. 481; Pace *v.* Robertson, 65 N. C. 550; Butler *v.* Butler, 8 W. Va. 674; Blow *v.* Maynard, 2 Leigh, 54; ex parte Rushforth, 10 Ves. 409, 420; Read *v.* Norris, 14 Cond. E. C. R. 362, 375; Kendrick *v.* Torney, 22 Gratt. 753; Butcher *v.* Churchill, 14 Ves. 567. The same rule

together with interest on the same [1] and the costs of suit.[2]

Secondly, the surety may in some of the States file a bill in chancery to enjoin proceedings against the surety and to compel the principal debtor to pay [3] or to compel the creditor to sue the principal debtor, on being indemnified against loss by delay or by the failure to secure satisfaction.[4]

Thirdly, if there are two or more co-sureties, the surety who pays the debt has the right to claim contribution of the co-sureties, in equal proportions.[5] And this claim of contribution can be enforced, whether it arises from the same, or from different instruments; [6] and even when their joint liability was unknown to them at the time of making the contract.[7] Successive indorsers are not co-sureties, unless they have by special agreement made themselves such.[8] But accommodation indorsers, who sign as sureties for the maker, sustain to each other the relation of co-sureties.[9]

applies although the surety has received from the principal a note for his indemnity. Child *v.* Eureka Powder Works, 44 N. H. 354.

[1] Petre *v.* Duncombe, 20 L. J. Q. B. 242.

[2] Hale *v.* Andrews, 6 Cow. 225; Cleveland *v.* Covington, 3 Strobh. 184. That costs are not allowable, where there is a frivolous defense, see 1 Parsons' N. & B. 243.

[3] Humphrey *v.* Hitt, 6 Grat. 524; Irick *v.* Black, 2 C. E. Green, 189.

[4] Humphrey *v.* Hitt, 6 Gratt. 524; King *v.* Baldwin, 17 Johns. 324.

[5] Davis *v.* Emerson, 17 Me. 64; Pitt *v.* Purssord, 8 M. & W. 538; Trevert *v.* Henry, 14 Nev. 191; Fletcher *v.* Jackson, 23 Vt. 581; Whiting *v.* Burke, L. R. 6 Ch. App. 342; Derosset *v.* Bradley, 63 N. C. 17; Camps *v.* Simmons, 62 Ga. 73; Norton *v.* Coons, 6 N. Y. 33; Lapham *v.* Barnes, 2 Vt. 213; Flint *v.* Day, 9 Vt. 345; Monson *v.* Drakely, 40 Conn. 552.

[6] Deering *v.* Earl of Winchelsea, 2 Bos. & P. 270; Mayhew *v.* Crickett, 2 Swanst. 184.

[7] Norton *v.* Coons, 6 N. Y. 33; Craythorn *v.* Swinburne, 14 Ves. 169.

[8] Briggs *v.* Boyd, 37 Vt. 534; Phillips *v.* Preston, 5 How. 278; McNielly *v.* Patchin, 23 Mo. 40.

[9] Steckel *v.* Steckel, 28 Pa. St. 233.

The claim to contribution may be released by the sureties themselves with [1] or without [2] the co-operation of the principal.

But the surety cannot claim contribution until he has paid more than his share of the debt; for the claim of contribution depends upon the payment of what the other surety was obliged to pay. And there must be an actual payment.[3]

[1] Simmons *v.* Camp, 64 Ga. 726.

[2] Paul *v.* Berry, 28 Ill. 158.

[3] Davis *v.* Humphreys, 6 M. & W. 153; Browne *v.* Lee, 6 B. & C. 421; Magruder *v.* Admire, 4 Mo. App. 133; Cowell *v.* Edwards, 2 B. & P. 268; Schoolley *v.* Fletcher, 45 Ind. 86; In re McLean *v.* Jones, 2 U. C. L. J. (N. S.) 206.

CHAPTER XXIII.

CHECKS.

SECTION 430. Definition.
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454. Overchecks.
455. Actual and presumptive rights and liabilities of the drawer of a check.
456. Payment by checks.

§ 430. **Definition.** — A check may be defined to be a draft or order, having essentially the characteristics of a bill of exchange, and differing from the bill (1) in

being drawn on a bank or banker, (2) apparently and presumptively against a deposit of funds, and (3) payable on demand without grace. The attempt to define checks by comparing them with bills of exchange is frequently criticised, as furnishing an incomplete definition.[1] But the definition, given in the text, is sufficient to point out the essential characteristics of a check, without requiring a second discussion of those principles, which are common to both bills and checks; while the points of differentiation between the two kinds of paper are more clearly and prominently set forth.[2]

§ 431. **Checks payable to order.** — According to the English authorities, the bank is under no obligation to pay checks which are payable to order, for the reason that the law merchant does not require it to assume the risk of pay-

[1] 2 Daniel's Negot. Inst., § 1567. Mr. Daniel defines a check to be "(1) a draft or order (2) upon a bank or banking house, (3) purporting to be drawn upon a deposit of funds (4) for the payment at all events of a certain sum of money, (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand." 2 Daniel, § 1566.

[2] In defining bank checks, the Supreme Court of the United States says: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, drawee, and payee. Without acceptance no action can be maintained by the holder upon either, against the drawee. The chief points of difference that (1) a check is always drawn on a bank or banker. (2) No days of grace are allowed. (3) The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. (4) It is not due until payment is demanded, and the statute of limitations runs only from that time. (5) It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. (6) It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such cases would be a fraud." Merchants' Bank *v.* State Bank, 10 Wall. 647.

ing the check to a wrong person on a forged indorsement.[1] By a late act of Parliament,[2] checks payable to order are declared to be legal and binding on the bank, but the same act provides that the bank is not responsible if it pays to the wrong person by reason of a forged indorsement.[3]

But the English rule is not followed in the United States; and there it is held that the bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person, to whose order they are made payable.[4]

§ 432. **Checks are drawn on bank or banker.** — The authorities are agreed as to the absolute necessity of a check being drawn on a bank or banker,[5] although it is not necessary for the drawee to be expressly designated as such in the paper.[6] This circumstance or fact, however, will not alone give to an order the character of a check; for a bill of exchange may be drawn on a bank or on one who is a banker.[7]

[1] Bellamy *v.* Mojoribanks, 8 Eng. L. & Eq. 519.

[2] 16 & 17 Vict., ch 59, § 19.

[3] The act provides that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom said draft or order was or is made payable, either by the drawer or any indorser thereof." See Charles *v.* Blackwell, 2 Com. Pl. Div. H. C. J.151.

[4] McIntosh *v.* Lytle, 23 Minn. 336; Dodge *v.* Nat. Exchange Bank, 30 Ohio St. 8; Bowen *v.* Newell, 4 Selden, 190. But see Woodruff *v.* Merchants' Bank, 25 Wend. 672.

[5] Espy *v.* Bank of Cincinnati, 18 Wall. 620; Deemer *v.* Brown, 1 McArth. 353; Bowen *v.* Newell, 8 N. Y. 195.

[6] Planters' Bank *v.* Kesee, 7 Heisk. 200.

[7] Georgia Nat. Bank *v.* Henderson, 46 Ga. 495.

§ 433. **Apparently and presumptively drawn against a deposit.** — It is also required to constitute a check, that the order purport to be drawn against funds on deposit. Inasmuch as no one has the right, without special consent, to draw on a bank when he has no funds on deposit with the bank, it has been sometimes stated that a check is an order on an existing fund or deposit.[1] But it is not true that the fact, that there is no deposit, will change the character of the order, which is apparently drawn against a deposit. If the order appears on its face to be drawn on some deposit, it is a check, even if there is no deposit, and the order was drawn without the consent of the bank or bankers.[2]

§ 434. **It must be payable on demand without grace.** — It is maintained by some of the authorities that an order on a bank, payable on a certain named day, for example, on the 10th of July, is a check, and is payable without days of grace.[3] And an order has been held to be a check,

[1] Morrison *v.* Bailey, 5 Ohio St. 13; Espy *v.* Bank of Cincinnati, 18 Wall. 620. It has been held that if there is no fund or deposit to be drawn against, the order is necessarily a bill of exchange. Planters' Bank *v.* Kesee, 7 Heisk. 200. See Brown *v.* Lusk, 4 Yerg. 210.

[2] See Deemer *v.* Brown, 1 McArth. 350; Champion *v.* Gordon, 70 Pa. St. 476; Newman *v.* Kaufman, 28 La. Ann. 865.

[3] Matter of Brown, 2 Story, 502; Champion *v.* Gordon, 70 Pa. St. 474; Bowen *v.* Newell, 5 Sandf. 326. In Champion *v* Gordon, *supra*, Sharswood, J., said: "The ordinary commercial form of a bill of exchange payable at a future day is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill, with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer by adopting the usual form must be held so to intend. So if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person. If such an order,

where it is drawn on a banker, and apparently against a deposit, although it is made payable a given number of days after date or sight.[1] But the weight of authority is decidedly opposed to this view, and holds that no order is a check unless it be payable instantly on demand.[2] If it is desired to draw a bill of exchange payable at a future day, without acceptance and without days of grace, this end can be attained by express provisions to that effect.

The courts are also divided as to the admissibility of parol evidence to prove a local usage in business circles to regard drafts payable at a future day as checks; some of the cases holding such parol evidence to be inadmissible,[3] and others that it is admissible.[4]

§ 435. **The form and formalities of the check.** — The form and formalities of the check differ but little from that of the ordinary bill of exchange. Like all other kinds of commercial paper, the check usually contains a date, although this is not necessary to the validity of the instru-

drawn upon a bank payable at a future day named in it, must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is, that on a day named he will have the amount of the check to his credit in the bank. In the meantime he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why, then, is a check expressly so made payable to stand on different grounds? "

[1] Westminster Bank *v.* Wheaton, 4 R. I. 30.

[2] Henderson *v.* Pope, 39 Ga. 361; Georgia Nat. Bank *v.* Henderson, 46 Ga. 496; Ivory *v.* Bank of the State, 36 Mo. 475; Morrison *v.* Bailey, 5 Ohio St. 13; Andrew *v.* Blackley, 11 Ohio St. 89; Minturn *v.* Fisher, 4 Cal. 36; Work *v.* Tatman, 2 Houst. (Del.) 304; Bradley *v.* Harrington, 5 Harr. 305.

[3] Morrison *v.* Bailey, 5 Ohio St. 13; Minturn *v.* Fisher, 4 Cal. 35.

[4] Bowen *v.* Newell, 3 Kern. 290; Champion *v.* Gordon, 70 Pa. St. 476.

ment.[1] It may contain the true date; or the check may be ante-dated or post-dated. And where a check is post-dated, it may be negotiated immediately, but it is not payable before the given date. The check is post-dated to enable the creditor to procure the means of satisfying his debt, while the debtor is given time in which to meet the payment of the check.[2]

The check must also call for the payment of money, and the same rules apply here to the check as were found to govern all other kinds of commercial paper, in reference to the subject-matter.[3]

In respect to the address of the drawee, the check differs somewhat in form from the bill of exchange. In a bill of exchange, the drawee's address is almost invariably in the left-hand corner, at the bottom. In a check, the address of the bank is usually written in large letters across the top; and, although it is sometimes done,[4] it is not necessary for any other address in the left-hand corner, such as "to the cashier." [5]

Where the check is drawn on a banker or banking firm, instead of on a chartered bank, it is probably the invari-

[1] 2 Daniel's Negot. Inst., § 1597; Morse on Banking, 238.

[2] Mohawk Bank *v.* Broderick, 10 Wend. 304; *s. c.* 13 Wend. 133; Salter *v.* Burt, 20 Wend. 205; Whister *v.* Foster, 32 L. J. C. P. 161; 14 C. B. (N. S.) 238; Austin *v.* Bunyard, 34 L. J. 217; Taylor *v.* Sip, 1 Vroom, 284; Allen *v.* Keeves, 1 East, 435; Matter of Brown, 2 Story, 502. If the post-date happens to fall on Sunday, the check is not payable before the Monday following. Salter *v.* Burt, *supra.*

[3] See Rastell *v.* Draper, Yelv. 80; Moore, 775; Cro. Jac. 88; Corgan *v.* Frew, 39 Ill. 31; Kearney *v.* King, 2 Barn. & Ald. 301; Northrop *v.* Sanborn, 22 Vt. 433; Smith *v.* Smith, 1 R. I. 398. See, for a full discussion of this matter, *ante*, §§ 29-29*e*.

[4] Matter of Brown, 2 Story, 502; Allen *v.* Sea Fire, etc., Ins. Co., M. G. & S. 573; Ellison *v.* Callingridge, M. G. & S. 570.

[5] 2 Daniel's Negot. Inst., § 1581. But see Morse on Banking, 238, where it is held to be safer to consider the address "to the cashier" to be essential.

able custom to put the address in the left-hand corner, as in the bill of exchange.

§ 436. **Certification of checks.** — Since the check is intended to be paid immediately, and is payable on demand, the parties cannot be said to contemplate any presentment for acceptance, it being payable whenever there is a presentment for any purpose.[1] But where the holder desires to be assured that the bank will pay the check when it is presented for payment, and yet keep the check in circulation, he may do so by having the check certified by an officer of the bank. The certification of checks is of very recent origin; but the practice has now become so common that "it is computed by competent authority that the average daily amount of such (certified) checks in use in the city of New York is not less than one hundred millions of dollars."[2] Certification has been said to be the "equivalent of acceptance."[3] But this is only true, so far as the liability of the drawee is concerned. As in the case of acceptance, the certification of the check makes the bank the principal debtor.[4] The claim to that part of the

[1] See *ante*, § 434.

[2] Merchants' Bank *v.* State Bank, 10 Wall. 648; Swayne, J., saying: "The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand, large sums of money. It is computed by a competent authority that the average daily amount of such checks in use in the city of New York is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their validity."

[3] Merchants' Bank *v.* State Bank, 10 Wall. 648.

[4] Merchants' Bank *v.* State Bank, 10 Wall. 648; Freund *v.* Importers, etc., Bank, 19 N. Y. S. C. 537; First Nat. Bank *v.* Leach, 52 N. Y. 350; Essex Co. Bank *v.* Bank of Montreal, 7 Biss. 193; Andrews *v.* German Nat. Bank, 9 Heisk. 217.

deposit is transferred by certification from the depositor to the holder of the check, and consequently the depositor cannot thereafter countermand the check, or exercise any other control over that part of the deposit which is covered by the check.[1] On the other hand, the bank cannot relieve itself of liability by showing that the check was a forgery, or that there were no funds, the certification being the assumption of an absolute liability.[2]

In every other way, the certification of checks differs from the acceptance of bills of exchange. Thus, since the parties are presumed to have intended immediate presentment for payment, the bank cannot do anything but pay the check, when it is presented, without discharging the drawer and indorsers. The certification of the check, therefore, operates to discharge these parties to the instrument, and leaves the bank alone liable on the check.[3]

The certified check also circulates as cash, in consequence of the absolute assumption of liability by the bank, and

[1] Gerard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Freund *v.* Importers, etc., Bank, 19 N. Y. S. C. (12 Hun) 537; 76 N. Y. 352; First National Bank *v.* Leach, 52 N. Y. 350.

[2] Espy *v.* Bank of Cincinnati, 18 Wall. 621. The bank, however, by its certification, does not do more than warrant the genuineness of the drawer's signature, and the officer is not authorized to bind the bank by any more extensive guaranty or assurance. Security Bank *v.* National Bank, 67 N. Y. 458; White *v.* Continental Bank, 64 N. Y. 316; Marine Nat. Bank *v.* Nat. City Bank, 59 N. Y. 67. And if the check has been certified by mistake, the certification may be revoked and annulled, as long as it is possible for this to be done in time to restore the holder of the check to his original position, and to his remedies over against the drawers and indorsers. Irving Bank *v.* Wetherald, 34 Barb. 323; 36 N. Y. 335; Second Nat. Bank *v.* West. Nat. Bank, 51 Md. 128. It cannot be revoked after the check has been transferred to a *bona fide* holder, without notice of the mistake. Bank of Republic *v.* Baxter, 31 Vt. 101.

[3] 2 Daniel's Negot. Inst., § 1604; Essex Co. Nat. Bank *v.* Bank of Montreal, 7 Biss. 197; First Nat. Bank *v.* Leach, 52 N. Y. 350. But where the indorser consents to the certification, or indorses afterwards, he is bound, along with the bank. Mutual Nat. Bank *v.* Rotge, 28 La. Ann. 933.

the amount of the check may be recovered of the bank at any time within the statutory period of limitations.[1]

§ 437. **Form of certification.** — Ordinarily, the bank officer simply writes across the face of the check the word "good"[2] or his name or initials;[3] and probably both should be used.

A verbal statement of a bank officer that the check was "good," or a verbal promise by him would have the effect of a regular written certification across the face of the check; provided it be communicated to the holder, as an inducement for him to take the check.[4] But where the bank certifies the checks without having funds of the drawer, it is held to be to such an extent a promise to answer for the debt of another, that it must be in writing, in order to satisfy the requirements of the statute of frauds.[5]

§ 438. **Who may certify for the bank.** — The by-laws of the bank may give to any officer the express power to certify checks. But, ordinarily, this is not done, and only

[1] Gerard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Willetts *v.* Phœnix Bank, 2 Duer, 121; 2 Daniel's Negot. Inst., § 1603; Morse on Banking, 281–283.

[2] Barnett *v.* Smith, 30 N. H. 256.

[3] Morse on Banking, 284.

[4] Barnet *v.* Smith, 30 N. H. 256; Pope *v.* Bank of Albion, 59 Barb. 226; Carr *v.* Nat. Security Bank, 107 Mass. 48; Bank *v.* Pettel, 41 Ill. 492; Nelson *v.* First Nat. Bank, 48 Ill. 36. But see Espy *v.* Bank of Cincinnati, 18 Wall. 621, where the court, through Miller, J., say in respect to a verbal certification: "There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it in circulation. Nothing was said or done by the bank officer which could be transferred with the check as a part of it to an innocent taker of it from the payee, such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would. But see Louisiana Nat. Bank *v.* Citizens' Bank, 28 La. Ann. 189.

[5] Morse *v.* Mass. Nat. Bank, 1 Holmes, 209.

those officers can certify checks who have the power by implication, *virtute officii*.

As a matter of course, the board of directors have the power, and they may delegate it to other officers, for they are the governing body of the corporation.[1] The following officers have the implied power to certify checks, but not to delegate it to others, viz.: The president,[2] the cashier,[3] and the teller.[4] But it is generally held that the assistant cashier has not this power. And if he signs his name with his official title, "Asst. Cashier," his certification is not binding on the bank, even in the hands of a *bona fide* holder.[5] Nor can any officer bind the bank by his certification of his own check, and it is void even as to a *bona fide* holder, when that fact is known to him or appears on the face of the paper.[6]

§ 439. **What checks may be certified and when.** — Ordinarily, the certification does not state the time of payment, and the check is payable on demand; but it may provide expressly for payment in the future, and in that case payment cannot be demanded in advance of that time.[7] On the other hand, no officer has the authority to certify checks before they are payable; and if a check is post-dated, the bank is not bound

[1] See *ante*, chapter on Private Corporations.

[2] Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293.

[3] Merchants' Bank *v.* State Bank, 10 Wall. 648; Clarke Nat. Bank *v.* Bank of Albion, 52 Barb. 592; Pope *v.* Bank of Albion, 59 Barb. 226; Cooke *v.* State Nat. Bank, 52 N. Y. 115. But see *contra* Mussey *v.* Eagle Bank, 9 Met. 213; Atlantic Bank *v.* Merchants' Bank, 20 Gray, 532.

[4] Farmers', etc., Bank *v.* Butchers', etc., Bank, 14 N. Y. 624; 16 N. Y. 133; Mead *v.* Merchants' Bank, 25 N. Y. 146; Irving Bank *v.* Wetherald, 36 N. Y. 335. *Contra* Mussey *v.* Eagle Bank, 9 Met. 313.

[5] Pope *v.* Bank of Albion, 57 N. Y. 127.

[6] Claflin *v.* Farmers', etc., Bank, 25 N. Y. 294, overruling *s. c.* in 36 Barb. 540. See also Titus *v.* G. W. Turnpike Co., 5 Lans. 253; N. Y. & M. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30, 64.

[7] Bank of England *v.* Anderson, 4 Scott, 50.

by the certification of a check before its date.[1] The officer is not authorized to certify any check, whose commercial character has been destroyed by the addition of unusual clauses or conditions, or which has not been presented in the usual course of business.[2]

Finally, no officer is authorized to certify the checks of one who has no funds on deposit. And such a certification is not binding on the bank, except as against a *bona fide* holder, without notice.[3] The fact that the check is presented for certification, without indorsement, and by some other person than the payee, does not invalidate the certification, provided the indorsement is procured before presentment for payment, or the check has been transferred by delivery to the person presenting it. The bank would in either case be protected in paying him.[4]

§ 440. **Negotiability and transfer of checks.** — Like bills and notes, checks are negotiable instruments, and are transferred by indorsement or by delivery. If the check is payable to order, the only legal transfer is by indorsement.[5]

Where a check is payable to bearer, indorsement is not necessary to its legal transfer. But sometimes the bank, in honoring the check, requires the holder to indorse it, as an acknowledgment of receiving payment, and also as a memorandum of the person to whom it was paid. It is

[1] Clarke Nat. Bank *v.* Bank of Albion, 52 Barb. 593.

[2] Dorsey *v.* Abrams, 85 Pa St. 299. As to what is meant by due course of business, see *ante*, chapter on Rights of *Bona Fide* Holders.

[3] Atlantic Bank *v.* Merchants' Bank, 10 Gray, 532; Claflin *v.* Farmers' etc., Bank, 25 N. Y. 293; Cooke *v.* State Nat. Bank, 52 N. Y. 115.

[4] Freund *v.* Importers', etc., Bank, 76 N. Y. 352. See and compare Abrams *v.* Union Nat. Bank, 31 La. Ann. 61.

[5] Conroy *v.* Warren, 3 Johns. Cas. 259; Woods *v.* Schroeder, 4 Har. & J. 276; Keene *v.* Beard, 8 C. B. (N. S.) 380; Merchants' Bank *v.* Spicer, 6 Wend. 445; Hoyt *v.* Seeley, 18 Conn. 353. For a full discussion of the subject of Transfer of Commercial Paper see previous chapters.

claimed that in such a case the holder is not bound as an indorser, unless it be shown that he signed his name *animo indorsandi*.[1]

§ 441. **Memorandum checks.** — A peculiar form of check has come into use in certain business communities, which is known as a memorandum check. It is described to be "a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."[2] Sometimes the bank's name is cancelled;[3] and it is held in Massachusetts that the cancellation of the bank's name destroys the presumption of consideration which attaches to the ordinary check, and requires express proof of value to enable a recovery of the drawer.[4]

If the memorandum check is presented to the banker for payment, he has a right to honor it; and if he does, the payment will have the same effect against the drawer, as if it were an ordinary check. The peculiar character of the memorandum check does not affect the relations of drawer and drawee.[5]

Evidence of the check being a memorandum check must be gathered from the check itself. It cannot be shown by parol evidence that an ordinary check was intended to be a memorandum check.[6]

[1] 2 Daniel's Negot. Inst., § 1653; Morse on Banking, 312; Ancone *v.* Marks, 7 Hurlst. & N. 686; Keene *v.* Beard, 8 C. B. (N. S.) 372.

[2] Franklin Bank *v.* Freeman, 16 Pick. 535; Cushing *v.* Gore, 15 Mass. 69; Morse on Banking, 313; Dykers *v.* Leather Bank, 11 Paige, 612.

[3] Ball *v.* Allen, 15 Mass. 433; Ellis *v.* Wheeler, 3 Pick. 18.

[4] Ball *v.* Allen, 15 Mass. 433; Ellis *v.* Wheeler, 3 Pick. 18.

[5] Morse on Banking, 313.

[6] Kelly *v.* Brown, 4 Gray, 108; American Emigrant Co. *v.* Clark, 47 Iowa, 672.

§ 442. **Presentment, notice and protest of checks.** — Except in the case of memorandum checks, it is as necessary, in order to hold the drawer and indorsers, to observe the rules in respect to presentment for payment and notice of dishonor, where the instrument is a check, as where it is a bill of exchange or a promissory note.

Indeed, in consequence of the intention of the parties to the check that payment should be immediate, and of the fact that the check is drawn against a deposit, these rules should be and are more strictly enforced, than in the case of other commercial paper.[1]

This is also the case with respect to protest. Whenever protest is required, in the case of bills and notes, to hold drawers and indorsers, it is required in the case of checks.[2]

But there is this difference between bills and checks as to the consequences of negligence or delay in demand and notice. The failure to make a prompt presentment on the day of maturity, and to give promptly the notice of dishonor, in the case of bills, will discharge the drawer and

[1] Merchants' Bank *v.* State Bank, 10 Wall. 657; Hoyt *v.* Seeley, 18 Conn. 353; Moody *v.* Mark, 43 Miss. 210; Linville *v.* Welch, 29 Miss. 203; Foster *v.* Paulk, 41 Me. 425; Pack *v.* Thomas, 13 Sm. & M. 11; Purcell *v.* Allemong, 22 Gratt. 742; Conkling *v.* Gandall, 1 Keyes, 228; Cruger *v.* Armstrong, 3 Johns. 79; Harker *v.* Anderson, 21 Wend. 372; Franklin *v.* Vanderpool, 1 Hall, 80; Conroy *v.* Warren, 3 Johns. 259; Sherman *v.* Comstock, 2 McLean, 10; Humphreys *v.* Bicknell, 2 Litt. 298; Clark *v.* Bank, 2 MacArth. 249; Farwell *v.* Curtis, 7 Biss. 160; Eichelberger *v.* Finley, Harr. & J. 381; True *v.* Thomas, 16 Me. 36; Matter of Brown, 2 Story, 502; Case *v.* Morris, 31 Pa. St. 100; Judd *v.* Smith, 10 N. Y. S. C. (3 Hun) 190; Middletown Bank *v.* Morris, 28 Barb. 616; Murray *v.* Judah, 6 Cow. 484; Merchants' Bank *v.* Spicer, 6 Wend. 445; Levy *v.* Peters, 9 Serg. & R. 125; Edwards *v.* Moses, 2 Nott & McC. 433; Daniel *v.* Kyle, 5 Ga. 245; Ford *v.* McClung, 5 W. Va. 156; Pollard *v.* Bowen, 57 Ind. 234.

[2] Harker *v.* Anderson, 21 Wend. 372; Moses *v.* Franklin Bank, 34 Md. 574; Norris *v.* Despard, 38 Md. 491. But see Morrison *v.* Bailey, 5 Ohio St. 13; Pollard *v.* Bowen, 57 Ind. 234, where checks are held not to require protest, presumably referring to inland checks. See also Griffin *v.* Kemp, 46 Ind. 172; Jones *v.* Heilinger, 36 Wis. 149.

indorsers, even though they have not suffered in any wise by the delay or neglect.[1] But in the case of checks, the drawer is not discharged by such neglect or delay, if he has not suffered any injury in consequence of it.[2] If the bank remains solvent, it does not matter how long presentment is delayed, the drawer is still bound, provided the statute of limitations has not run against the right of action.[3]

If it be shown by the plaintiff in an action against the drawer of the check, that there has been presentment and due notice, it is incumbent on the drawer to prove loss in consequence of any delay in presenting for payment.[4] And so, also, where the action is on the pre-existing debt, and it is shown that there has been no presentment of the check at all, the burden of proving loss is on the drawer.[5] But if, in an action on the check, it be shown that the check had not been presented for payment, the burden is on the holder to show that the drawer has not suffered any loss from the failure to make presentment, the presumption of

[1] See *ante*, 366.

[2] Stewart *v.* Smith, 17 Ohio St. 52; Taylor *v.* Slip, 1 Vroom, 284; Conroy *v.* Warren, 3 Johns. 259; Little *v.* Phœnix Bank, 2 Hill, 425; Park *v.* Thomas, 13 Sm. & M. 11; Morrison *v.* Bailey, 5 Ohio St. 13; Cork *v.* Racon, 45 Wis. 192; Howes *v.* Austin, 35 Ill. 396; Lawrence *v.* Schmidt, 35 Ill. 440; Morrison *v.* McCartney, 30 Mo. 183; Matter of Brown, 2 Story, 502; Alexander *v.* Burchfield, 7 M. & G. 1067; Keene *v.* Beard, 8 C. B. (N. S.) 380; Blair *v.* Hoge & Wilson, 28 Gratt. 171; Purcell *v.* Allemong, 22 Gratt. 743; Deaner *v.* Brown, 1 MacArth. 350; Clark *v.* Nat. Metrop. Bank, 2 MacArth. 249; Emery *v.* Hobson, 63 Me. 32; Murray *v.* Judah, 6 Cow. 490; Mohawk Bank *v.* Broderick, 10 Wend. 309; Planters' Bank *v.* Kesee, 7 Heisk. 200; Daniel *v.* Kyle, 1 Kelly, 304; Cox *v.* Boone, 8 W. Va. 500; Scott *v.* Meeker, 20 Hun, 163; Heartt *v.* Rhodes, 66 Ill. 351; Stevens *v.* Park, 73 Ill. 387; Gregg *v.* George, 16 Kan. 546; Searle *v.* Norton, 2 M. & K. 401; Robinson *v.* Hawksford, 9 Q. B. 52; Griffin *v.* Kemp, 46 Ind. 172; Kinyon *v.* Stanton, 44 Wis. 479, where the bank failed, but the drawer had withdrawn his funds.

[3] Emery *v.* Hobson, 63 Me. 32; Bell *v.* Alexander, 21 Gratt. 6.

[4] Stewart *v.* Smith, 17 Ohio St. 85, 86.

[5] Syracuse, etc., R. R. Co. *v.* Collins, 3 Lans. 29; *s. c.* 57 N. Y. 641.

law being that there was damage.[1] The rule is different with regard to the indorsers; they are discharged whether they have suffered any consequential damage or not from the failure to make due presentment and give the notice of dishonor within a reasonable time.[2]

§ 443. **Within what time must check be presented.** — Inasmuch as the failure of the bank before presentment is the principal, if not the invariable, occasion of loss from a neglect or delay of presentment, almost any delay is likely to produce the loss; and, hence, but a limited time is given in which to make presentment, the length of time varying with the persons between whom the question arises.

(1) *First*, as between the drawer and payee: Where the payee receives it in the same place in which the bank is situated, the payee has the next day in which to make the presentment. And if he delays presentment beyond the banking hours of the next day, and the bank fails in the meantime, the loss will fall on the holder of the check.[3]

[1] Little *v.* Phœnix Bank, 2 Hill, 425; Harbeck *v.* Craft, 4 Duer, 122; Ford *v.* McClung, 5 W. Va. 166; Daniel *v.* Kyle, 1 Kelly, 304. But the presumption of damage is rebutted by proof of the fact that the drawer had no funds on deposit, or had withdrawn them. Eichelberger *v.* Finlay, 7 Har. & J. 381; Shaffer *v.* Maddox, 9 Neb. 205; Healy *v.* Gilman, 1 Bos. 235; Kinyon *v.* Stanton, 44 Wis. 479.

[2] Merchants' Bank *v.* Spicer, 6 Wend. 445; Murray *v.* Judah, 6 Cow. 490; Daniel *v.* Kyle, 1 Kelly, 304; Little *v.* Phœnix Bank, 2 Hill, 429; Humphreys *v.* Bicknell, 2 Litt. 298; Harbeck *v.* Craft, 4 Duer. 129.

[3] O'Brien *v.* Smith, 1 Black, 99; Mead *v.* Caswell, 9 Mod. 60; Cox *v.* Boone, 8 W. Va. 500; Cawein *v.* Browinski, 6 Bush, 457; Shrieve *v.* Duckham, 1 Litt. 192; Morrison *v.* Bailey, 5 Ohio St. 13; Veazie Bank *v.* Winn, 40 Me. 60; Boddington *v.* Schlenker, 4 Barn. & Ald. 752; Rickford *v.* Ridge, 2 Camp. 537; Syracuse, etc., R. R. Co. *v.* Collins, 3 Lans. 29; 57 N. Y. 641; Smith *v.* Miller, 6 Rob. (N. Y.) 157; 43 N. Y. 171; 52 N. Y. 546; Nunnemaker *v.* Lanier, 48 Barb. 234; Kelty *v.* Bank, 52 Barb. 328; Merchants' Bank *v.* Spicer, 6 Wend. 443; Bickford *v.* First Nat. Bank, 42 Ill. 238; Ritchie *v.* Bradshaw, 5 Cal. 228, Himmelman *v.* Hataling, 40 Cal. 111; Simpson *v.* Pac., etc., Ins. Co., 44 Cal. 139; Bailey *v.* Bodenham, 16 C. B. (N. S.) 288; Robson *v.* Bennett, 2 Taunt. 410. See Andrews *v.*

The suspension of the bank during the banking hours of the next day will not impose the loss upon the holder, if there was still time to make the presentment; and such a suspension would be an excuse for not making the presentment afterwards.[1] But if the check was presented at an early hour of the next day after receiving it, and the payment was tendered, but declined until a later hour; and in the meantime the bank should suspend payment, the loss would fall upon the holder, and the drawer would be discharged.[2]

Where the payee receives the check at a distance from the place where the bank is situated, he has the whole of the day after receiving it, in which to forward the check for presentment through an appropriate channel, by mail or express, to the place where the bank is situated. And the person, to whom it is sent for presentment, has the next day after receiving it in which to make the presentment. And any loss from a failure of the bank during the time thus required for the transportation of the check would fall on the drawer.[3] If the party who receives the check resides in the country away from the post-office, the rule as to diligence in forwarding the check for presentment is not so strictly enforced as in other cases.[4]

German Nat. Bank, 9 Heisk. 211; Clark *v.* Nat. Metrop. Bank, 2 MacArth. 249. But the allowance of a day for presentment does not extend to an agent who takes a check in payment of a debt due to his principal. He must present it immediately. Smith *v.* Miller, 43 N. Y. 171; First Nat. Bank *v.* Fourth Nat. Bank, 17 Hun, 332; Farwell *v.* Curtis, 7 Biss. 165

[1] Syracuse, etc., R. R. Co. *v.* Collins, 3 Lans. 29.

[2] Simpson *v.* Pac., etc., Insurance Co., 44 Cal. 143.

[3] Smith *v.* Jones, 20 Wend. 192; Hare *v.* Henty, 30 L. J. C. P. 302; Bond *v.* Warden, 1 Collyer, 583; Rickford *v.* Ridge, 2 Camp. 537; Middletown Bank *v.* Morris, 28 Barb. 616; Moule *v.* Brown, 4 Bing. N. C. 266.

[4] Cox *v.* Boone, 8 W. Va. 500, where a distance of four miles from the post-office was held to excuse the delay of two days in forwarding the check. But, perhaps, it is not a reliable case to follow.

Secondly, the same rules apply to the indorsee, in his relations with his immediate indorser, viz.: he has the next day after receiving the check in which to present for payment or to forward for presentment, the indorser being regarded as a new drawer.[1] But if more time has elapsed between the original negotiation of the check and its final presentment for payment by the indorsee than what is allowed by law to the payee, the drawer is discharged, although the immediate indorser is still bound. The law does not permit any extension of the risk of the drawer by a series of transfers by indorsement or by delivery. The check is designed for immediate presentment and not for circulation.[2]

§ 444. **Whether check can be presented by mail.** — The ordinary method of forwarding a check for presentment, where it is negotiated at a distance from the place where the bank is situated, is by mail or express to some third person as agent, who is charged with the duty of presenting it to the bank for payment. But a custom has grown up of late, to send the check direct to the bank on which it is drawn; in other words, to make presentment by mail. The sufficiency of this method of presentment has been doubted,[3] but it seems that this method is more or less commonly adopted, and the weight of authority is in favor of its sufficiency.[4]

[1] Mohawk Bank *v.* Broderick, 10 Wend. 304; 13 Wend. 133.

[2] Down *v.* Halling, 4 Barn. & C. 333; Foster *v.* Paulk, 41 Me. 425; Lilley *v.* Miller, 3 Nott & McC. 257; Taylor *v.* Young, 3 Watts, 343; Cruger *v.* Armstrong, 3 Johns. 5; St. John *v.* Homans, 8 Mo. 382; Boehm *v.* Sterling, 7 T. R. 423; Reid *v.* Reid, 11 Tex. 585; Brown *v.* Lusk, 4 Yerg. 210; Harker *v.* Anderson, 21 Wend. 372.

[3] Farwell *v.* Curtis, 7 Biss. 162; Hopkins, J., saying: "In these days, when such facilities are furnished by express companies for presentation at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object."

[4] Indig *v.* National City Bank, 80 N. Y. 101, Rapallo, J., saying: "The

§ 445. **Excuses for failure or delay in dēmand and notice of dishonor.** — It may be stated, as a general proposition, that the same excuses will suffice for failure to present a check for payment, and to give notice of dishonor, as in the cases of commercial paper in general. This subject has been already fully discussed, and will not be repeated here.

The most common excuse in the case of checks is that the drawer has no funds in bank, against which to draw. It is considered a fraud for one to draw a check on a bank, in which he has no funds; and he is liable to the holder on the check without any notice of dishonor.[1] Of the same character is the countermanding of the payment.[2] It has also been held that a partial want of funds is a good excuse for failure or delay in presentment.[3]

defendant, instead of sending the note to an agent or correspondent at Louisville, for presentation, sent it by mail directly to the respondent (the National City Bank), where it was payable. This appears to be an ordinary method of transacting such business, and the defendant was bound only to adopt the ordinary rule." Bailey *v.* Bodenham, 16 C. B. J. Scott (N. S.), 294, Erle, C. J.: "I do not mean to affirm that this was a good presentment. I incline to think it was. But unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of dishonor should have been given promptly." See also Heywood *v.* Pickering, 9 L. R. Q. B. 428; Hare *v.* Henty, 10 L. R. Q. B. 65; Rideaux *v.* Criddle, 4 L. R. Q. B. 428; Shipsey *v.* Bowery Nat. Bank, 59 N. Y. 485.

[1] Fletcher *v.* Pierson, 69 Ind. 281; Kinyon *v.* Stanton, 44 Wis. 569; Cushing *v.* Gore, 15 Mass. 59; Norris *v.* Despard, 38 Md. 491; Conroy *v.* Warren, 3 Johns. 259; Commercial Bank *v.* Hughes, 17 Wend. 94; Healy *v.* Gilman, 1 Bosw. 235; Valk *v.* Simmons, 4 Mason, 113; Lilley *v.* Miller, 2 Nott & McC. 257; Kemble *v.* Mills, 1 Man. & G. 757; 2 Scott N. R. 121; Bell *v.* Alexander, 21 Gratt. 6; Bush *v.* Barrett, 82 N. Y. 401; Hoyt *v.* Seeley, 18 Conn. 353; True *v.* Thomas, 16 Me. 36; Eichelberger *v.* Finley, 7 Har. & J. 381; Murray *v.* Judah, 6 Cow. 484; Franklin *v.* Vanderpool, 1 Hall, 78; Matter of Brown, 2 Story, 502; Blankenship *v.* Rogers, 10 Ind. 333; Coyle *v.* Smith, 1 E. D. Smith, 300.

[2] Jack *v.* Darrin, 3 E. D. Smith, 557; Whaley *v.* Houston, 12 La. Ann. 585; Purchase *v.* Mattison, 6 Duer, 587; Woodin *v.* Frayze, 38 N. Y. S. C. 190.

[3] Eichelberger *v.* Finley, 7 Harr. & J. 381, 387

§ 446. When is a check considered stale or overdue. — A check is considered stale or overdue, so as to let in equitable defenses, whenever the delay in presentment has been so long that, in the light of the circumstances of the particular case, it is sufficient to arouse the suspicions of a reasonably prudent man. So much may be taken as a reliable statement of the law, notwithstanding it is claimed by one authority[1] that a check is "never overdue." But it is so general a statement that something more specific is felt to be required. It is, however, impossible to state the precise period at which a check becomes overdue,[2] the conclusion in each case being determined by a consideration of the special circumstances surrounding the parties. Thus, in the light of the circumstances of the case, a check has been held to be overdue, when there was a delay in presentment of two and a half years;[3] one year;[4] fourteen months;[5] five months;[6] five days.[7] On the other hand, the check was held to be not overdue, and may still be negotiated free from equitable defenses, where there has been a delay of one month;[8] ten days;[9] eight days;[10] six days;[11] four days;[12] one day.[13]

Where the drawer allows some time to elapse after the date of the check before it is delivered to the payee, the

[1] Thompson on Bills, 118.

[2] Mr. Daniel says: "The certain age at which a check may be said to be stale is as uncertain as the fixing of the day on which a young lady becomes an old maid." 2 Daniel's Negot. Inst., § 1634.

[3] Skillman *v.* Titus, 32 N. J. L. 96.

[4] Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

[5] Cowing *v.* Altman, 71 N. Y. 436.

[6] First Nat. Bank *v.* Needham, 29 Iowa, 249.

[7] Down *v.* Halling, 4 B. & C. 330; 6 D. & R. 445; 2 C. & P. 11.

[8] Lester *v.* Given, 8 Bush, 357.

[9] Ames *v.* Merriam, 98 Mass. 294.

[10] London & County Bank *v.* Groome, L. R. 8 Q. B. D. 288

[11] Rothschild *v.* Corney, 9 B. & C. 388.

[12] First Nat. Bank *v.* Harris, 108 Mass. 514.

[13] Himmelman *v.* Hotaling, 40 Cal. 111.

check is not overdue, and the indorsee or bank takes it free from existing defenses, since in that case the lapse of time between the date and the day of presentment is caused by the drawer instead of by the payee.[1]

§ 447. **The right to draw against deposits — How must check be executed.** — It is, of course, a plain proposition of law that only the depositor, or his duly authorized agent, has the right to draw against the deposit. And it is safest for the bank to refuse to honor any check, whose signature varies in any way from the name on its books.[2] If the deposit is made by an agent or trustee, the bank cannot treat it as a private fund, and attach it for the satisfaction of his private indebtedness to the bank.[3]

If the deposit is made by a partnership, the check must be signed in the firm name, and any one of the active partners may issue it.[4] It seems that a bank may honor a check, as a firm check, to which the names of all the partners are signed.[5] If the deposit is put in the name of one partner, but it was in fact partnership funds, the bank may justify itself in honoring partnership checks, when drawn against this fund, by showing that it was intended to constitute a fund for partnership purposes.[6]

If two firms unite in a deposit, forming a third partner-

[1] Cowing *v.* Altman, 71 N. Y. 436, overruling 5 Hun, 556; Boehm *v.* Sterling, 7 T. R. 423.

[2] Innes *v.* Stephenson, 1 M. & R. 145; Sloman *v.* Bank of England, 14 Sim. 459; 9 Jur. 243; Tryon *v.* Okley, 3 G. Greene (Iowa), 289; Stone *v.* Marsh, Ryan & M. 364; Dixen's Case, 2 Lewin Cr. Cas. 178.

[3] Central Nat. Bank *v.* Conn. Mut. Ins. Co., 104 U. S. (1881) 54; Pannell *v.* Hurley, 2 Collyer, 241. See also Duncan *v.* Jandon, 15 Wall. 165; In re Gross, 6 Ch. App. 632; Bailey *v.* Finch, L. R. 7 Q. B. 34; Bundy *v.* Town of Monticello, 84 Ind. (1882) 119.

[4] Cook *v.* Seeley, 2 Exch. 749.

[5] Morton *v.* Seymour, 3 C. B. 792; Ex parte Buckley, 14 M. & W. 469, overruling Hall *v.* Smith, 1 Barn. & C. 407; Williamson *v.* Johnson, 1 Barn. & C. 149.

[6] Sims *v.* Bond, 5 Barn. & Ad. 389.

ship, checks may be drawn against the deposit by either firm.[1]

If several persons, not partners, in their individual capacity, make a deposit to their joint credit, they must all join in signing the check, unless the deposit is to their joint and several credit, when any one may draw the check.[2] If two or more trustees make a deposit of trust funds, it seems that they must all join in drawing the checks,[3] although a court of equity can sanction the drawing of the checks by any number less than all of them.[4] It is different with personal representatives. Any one of them may draw checks against the deposits of the decedent's estate, without being joined by the rest of them.[5] Upon the death of an executor, the checks should be drawn by the administrator *de bonis non*.[6]

In the case of deposits of corporations, it is incumbent upon the bank to ascertain what officers are authorized by the charter or by-laws of the corporation to sign checks.[7] If the corporation accepts the proceeds of checks issued by an officer who is not authorized to act in that capacity, the corporation is estopped from showing the officer's want of authority.[8]

[1] Duff *v.* East India Co., 15 Ves. jr. 198.

[2] Morse on Banking, 266. When one of two or more joint depositors absconds, equity will afford relief to the others. Ex parte Hunter, 2 Rose, 382; Ex parte Collins, 2 Cox, 427.

[3] Morse on Banking, 267.

[4] Shortbridge's Case, 12 Ves. jr. 28.

[5] Pond *v.* Underwood, 2 Ld. Raym. 1210; Allen *v.* Dundas, 3 T. R. 125; Gaunt *v.* Taylor, 2 Hare, 413; Can *v.* Read, 3 Atk. 695; Ex parte Rigby, 19 Ves. 462.

[6] Alleghany Bank's Appeal, 48 Pa. St. 328; Farmers', etc., Bank *v.* King, 57 Pa. St. 364.

[7] Fulton Bank *v.* N. Y. & Sharon Canal Co., 4 Paige, 127; In re Norwich Town Co., 22 Beav. 143; Serrell *v.* Derbyshire R. R. Co., 9 C. B. 811; 19 L. J. C. P. 377.

[8] Mahoney Mining Co. *v.* Angelo Cal. Bank,—— U. S. (1882) ——.

§ 448. **Whether death revokes check.** — Although it has been held by some of the writers that a check is revoked by the death of the drawer,[1] the better opinion is that the death of the drawer does not revoke the check, if it has been negotiated for a valuable consideration; but that it does revoke it if it is based upon a good consideration. Where the check is supported by a valuable consideration, it may be likened to a power coupled with an interest.[2]

§ 449. **Conditions which the bank may exact, before honoring check.** — If the check is payable to order, and the bank pays the money to one who is not an indorsee, and without an indorsement in blank, and who is not a *bona fide* assignee of the check, the bank will still be responsible for payment to the party who is entitled to payment. But if the party receiving payment is entitled to it as assignee, the check will be extinguished, although it is unindorsed.[3] So, also, is it the loss of the bank, if it pays the check on a forged indorsement.[4] And it is also held that the bank will be liable if it pays a check before maturity,— *i.e.*, before its date, where it is post-dated,— to any one but the lawful owner, although it is payable to bearer, since a check is not payable before its date.[5] For

[1] Morse on Banking, 260: "At the instance of his (the drawer's) death, the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his property." Chitty on Bills, 429; 2 Parsons' N. & B. 82.

[2] Burke *v.* Bishop, 27 La. Ann. 465 (21 Am. Rep. 567); Cutts *v.* Perkins, 12 Mass. 206; Tate *v.* Hilbert, 2 Ves. jr. 118; 4 Brown Ch. 286, where it was held that the gift of the donor's check was not a valid *donatio mortis causa*.

[3] Freund *v.* Importers & Traders' N. B., 76 N. Y. 352.

[4] Risley *v.* Phœnix Bank, 18 N. Y. S. C. (11 Hun) 484; Dodge *v.* National Exchange Bank, 30 Ohio St. 1.

[5] "Payment of the check by the bank before it is due will not be a discharge unless made to the real proprietor of it; and, therefore, where a

this reason, the bank is entitled to a reasonable time in which to ascertain whether the signatures are all genuine.[1]

The bank may also take a reasonable time for ascertaining whether there are sufficient funds on deposit to meet the check. In London, the bank has until 5 p. m. of the day on which it is presented, to ascertain the condition of the drawer's account.[2] But it has been held in the United States, that the bank might return a check at any time within twenty-four hours after presentment if it discovers a deficiency in the deposit against which it is drawn.[3] But this can only be the case where there has been no acceptance of the check. Once the check is accepted, and the money paid out or passed to the credit of the checkholder, it cannot be recalled because the bank has subsequently discovered a want of funds.[4] But where the check has been received, but neither the money nor the credit was given on it, the check may be returned on the discovery of the want of funds.[5] In California, it is held that if the check of another is deposited, and credit given to the depositor on his bank-book, the check is received for collection, and if not paid may be returned and cancelled.[6]

If the bank has not funds enough to pay the check in

banker, contrary to usage, paid the check before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing. In this case, although the holder had the legal title arising from the possession of the check, yet he was not *bona fide* the holder, with authority to collect, and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it." Shaw, C. J., in Wheeler *v.* Gould, 20 Pick. 545. See also Bristol Knife Co. *v.* First Nat. Bank, 41 Conn. 421.

[1] Robarts *v.* Tucker, 4 Eng L. & Eq. 236.

[2] Morse on Banking, 251.

[3] Overman *v.* Hoboken City Bank, 31 N. J. L. 563.

[4] Pratt *v* Toot, 9 N. Y. 463; Oddie *v.* National City Bank, 45 N. Y. 735. See Irving Bank *v.* Wetherald, 36 N. Y. 337.

[5] Boyd *v.* Emerson, 2 Ad. & El. 184.

[6] Nat. Gold Bank *v.* McDonald, 51 Cal. 65.

full, it is not obliged to make payment in part, certainly not, unless the holder is willing to surrender the check to be held as a voucher by the bank, nor is the holder obliged to receive it.[1]

§ 450. **Order of payment.** — The bank is under obligation to pay checks in the order of their presentment, and cannot distribute an insufficient fund *pro rata* amongst those who hold checks drawn against it, or give the preference to the holder of a check which is presented at a later hour.[2] It is doubtful what is the duty of the bank where two or more checks are presented simultaneously, and the fund drawn against is smaller than the aggregate amount of the checks. It seems that the bank is not obliged to pay any of the checks,[3] although it is said that the bank could hardly subject itself to liability if it were to pay the check which is first in date.[4]

§ 451. **Forgeries and alterations.** — The principles relating to the forgery and alteration of checks differ but little from those which govern the same subjects in application to commercial paper in general, and which have been already fully presented.[5] Little, therefore, remains to be said.

The bank is, however, under a peculiar obligation to know the signatures of its depositors on the checks drawn against it, the obligation being stricter than that of the

[1] 2 Parsons' N. & B. 78, 79; Bromley *v.* Commercial Nat. Bank (Court of Com. Pleas, of Philadelphia), cited in 2 Daniel's Negot. Inst., § 1620, from 5 Am. Law Times, 219; Matter of Brown, 2 Story, 502; Murray *v.* Judah, 6 Cow. 490; St. John *v.* Homans, 8 Mo. 382.

[2] 2 Parsons' N. & B. 78; Matter of Brown, 2 Story, 502; Morse on Banking, 248, 249.

[3] Dykers *v.* Leather Mfg. Bank, 11 Paige, 611.

[4] 2 Parsons' N. & B. 78.

[5] See *ante*, chapter on Forgeries and Alterations.

drawee of a bill of exchange.[1] But the bank cannot be expected to have any peculiar knowledge of the genuineness of the contents of a check, since a check is very commonly filled out by a clerk in a different handwriting. That fact, *i.e.*, that the body of the check is in a different handwriting, is in itself no cause for suspicion.[2] The authorities may, therefore, be expected to show a variance of the rules between the effect of alterations in general, and of forgeries of the signature.

If a check is altered in any material part, the bank may recover the money improperly paid on it from the person to whom it is paid; for the holder of the check guarantees the genuineness of its contents. And the bank can recover, although the check has been certified to or pronounced to be all right.[3]

If the drawer or his agent has been negligent in filling up the check, leaving blank spaces, thereby enabling the alteration of a check in such a manner as not to arouse the suspicions of the bank or of any holder, the drawer is himself liable on the check, as altered. But he is not liable, if he has not been negligent in this respect.[4]

[1] Smith *v.* Mercer, 6 Taunt. 76. See People's Sav. Bank *v.* Capps, 91 Pa. St. 315.

[2] Nat. Bank of Commerce *v.* Nat. Mech. Bank. Assn., 55 N. Y. 213; Nat. Park Bank *v.* Ninth Nat. Bank, 55 Barb. 124; 46 N. Y. 77; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Redington *v.* Wood, 45 Cal. 406.

[3] Espy *v.* Bank of Cincinnati, 18 Wall. 614; Nat. Park Bank *v.* Ninth Nat. Bank, 55 Barb. 124; 46 N. Y. 77; Marine Nat. Bank *v.* Nat. City Bank, 55 N. Y. 211; 59 N. Y. 67; Parker *v.* Roser, 67 Ind. 500; Third Nat. Bank *v.* Allen, 59 Mo. 310; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Redington *v.* Wood, 45 Cal. 406; Security Nat. Bank *v.* Nat. Bank, 67 N. Y. 461.

[4] Young *v.* Grote, 4 Bing. 253; Bank of Commerce *v.* Union Bank, 3 Comst. 230; Belknap *v.* Nat. N. A., 100 Mass. 379; Hardy *v.* Chesapeake Bank, 51 Md. 562. "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the

The bank's obligation to know the signature of its depositors is so strictly enforced by some of the authorities, that it is held by them to be impossible for the bank to recover back money paid on a forged check, even though the forgery is discovered in time to save to the check-holder all of his remedies against prior indorsers.[1] But there are other authorities which are disposed to enforce the rule more leniently, holding that the bank can recover back the money paid out on a check with the forged signature of a depositor, if the forgery was so good a counterfeit as to free the bank of the charge of negligence in taking it for a genuine signature; provided the forgery is discovered and the return of the money demanded in time to enable the holder of the check to employ his remedies against the *bona fide* parties to the check.[2] Nor will the bank be precluded from recovering the money from a holder who took the check under circumstances likely to arouse one's suspicions, or who by his words or actions misled the bank into the belief that the check was genuine, or induced it to omit its usual precautions against frauds and forgeries.[3] So, also, can the bank recover back the money

bank, for it acts at its peril and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril."

[1] Levy *v.* Bank of United States, 4 Dall. 234; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333; First Nat. Bank *v.* Ricker, 71 Ill. 439; Morse on Banking, 296: "The fact in this case is one in which the drawee has no right to mistake. The law refuses to hear him say he has mistaken it. The money is paid through the failure to fulfill his acknowledged duty, inasmuch as he has failed to detect the very non-existence of the merely supposed fact of signature by a certain person."

[2] 2 Daniel's Negot. Inst., § 1655a; 2 Parsons' N. & B. 80; Chitty on Bills (13 Am. ed.) [* 431], 485. See also Irving Bank *v.* Wetherald, 36 N. Y. 335.

[3] Gloucester Bank *v.* Salem Bank, 17 Mass. 33, 42; First Nat. Bank *v.* Ricker, 71 Ill. 439; Nat. Bank of N. A. *v.* Bangs, 106 Mass. 445; Ellis *v.* Ohio Ins., etc., Co., 4 Ohio St. 628.

paid on a forged check, where the check is presented for payment by another bank, and it is proven to be customary for the drawee bank to omit its usual precautions against such frauds, in reliance upon the care observed by the presenting bank.[1]

If the money is paid on a forged indorsement, the bank is still liable to the payee or indorsee on whose indorsement alone is the check payable.[2] But the bank is not obliged to know the signatures of indorsers, and if any of them be forged, the bank can recover back the money paid out on the check.[3]

§ 452. **The right of checkholder to sue the bank.** — It has been explained elsewhere[4] why the holder of an unaccepted bill of exchange cannot sue the drawee for his refusal to honor the bill. It was there explained[5] that there is but one way to establish privity between the payee or holder and the drawee of an unaccepted bill, and that was on the theory that the bill operated as an assignment *pro tanto* of the fund against which it was drawn. This was shown to be inapplicable to bills of exchange, which were drawn for a part of the fund,[6] because creditors are prohibited from splitting up a single indebtedness into many, without the consent of the debtor; and even where the bill was drawn for the whole of the fund, the further objection was to be met, that because it was not drawn against a particular fund, there was not in the bill a

[1] Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628.

[2] Johnson *v.* First Nat. Bank, 13 N. Y. S. C. (6 Hun) 126; Talbot *v.* Bank of Rochester, 1 Hill, 295.

[3] Morgan *v.* Bank, 1 Duer, 434; 1 Kern. 404; Seventh Nat. Bank *v.* Cook, 73 Pa. St. 483; Dodge Nat. Exch. Bank, 20 Ohio St. 246; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Morse on Banking, 308–310.

[4] See *ante*, §§ 5–5*c*.

[5] See § 5.

[6] See *ante*, § 5*a*.

sufficient description of the fund, to enable the bill to operate as an assignment.[1]

In this place, we raise the question whether a check-holder can sue the bank, before it has certified the check or agreed to pay it; or, in other words, does the check operate as an assignment *pro tanto* of the fund or deposit, against which it was drawn. And we ascertain from a discussion of the same question, in reference to unaccepted bills of exchange, that two things must be shown, in order to establish the doctrine that the check operates as an assignment as against the bank, on which it is drawn, viz.: *first*, that the bank or banker on whom the check is drawn had consented to the drawer's division of his one debt, in the shape of a deposit, into as many checks as the depositor is pleased to draw; and, *secondly*, that there was a sufficient description of the fund to enable an identification of the thing assigned.

The first proposition is very easily established. When the deposit is made at a bank, the bank impliedly promises to honor any and all checks which the depositor might draw against the deposit, and for any amount as long as the deposit has not been exhausted. And even those cases, which deny that the check operates as an assignment, so as to enable the holder to sue the bank, admit that the bank has broken its contract with the drawer, in not honoring the check, and is liable in damages to the drawer for this breach.[2]

[1] See *ante*, § 5c.

[2] Bank of the Republic *v.* Millard, 10 Wall. 152; Carr *v.* Nat. Security Bank, 107 Mass. 45; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Tyler *v.* Gould, 48 N. Y. 682; Van Alen *v.* Am. Nat. Bank, 52 N. Y. 4; Duncan *v.* Berlin, 60 N. Y. 151; Nat. Bank *v.* Second Nat. Bank, 69 Ind. 579; Essex Bank *v.* Bank of Montreal, 7 Biss, 193; Moses *v.* Franklin Bank, 34 Md. 580; Bellany *v.* Majoribanks, 8 E. L. & Eq. 523; Chapman *v.* White, 2 Seld. 412; Planters' Bank *v.* Merrit, 7 Heisk. 117; Planters' Bank *v.* Kesse, 7 Heisk. 200; Bullard *v.* Randall, 1 Gray, 605; Purcell *v.*

The bank, therefore, has consented to the drawing of the checks in any amount; and since the checks are to be made payable to whomsoever the drawer selects, it is not a wide stretch of legal principles to claim that if the check can operate as an assignment *pro tanto* of the deposit, as to any person or for any purpose, this obligation to honor the check will pass to the checkholder as an incident of the assignment. The drawer's interest in the deposit is a *chose in action* against the bank, coupled with the right to divide it up into as many *choses in action* as may suit him best, that interest *pro tanto* would be passed into the hands of the checkholder, and invest him with the right of action against the bank to enforce payment, if there are funds in its possession and under its control, at the time of presentment and demand. An indorsement on the check by the payee, to pay to the order of another, works an assignment of the payee's interest in the check. If such an indorsement assigns the indorser's interest in the check, what reasons can be urged why the check does not assign the drawer's interest *pro tanto* in the deposit to the payee? When a depositor draws a check on the bank it is evidently his intention to transfer to the checkholder his interest in the deposit to the amount of the check. The words which are generally employed "pay to the order of," "pay to the bearer," are sufficient to manifest that intention. Moreover, it is unquestionably the general understanding of the business world that such is the effect of a check, whatever

Allemong, 22 Gratt. 742; Case *v.* Henderson, 23 La. Ann. 49, overruling Van Bibber *v.* La. Bank, 14 La. Ann. 481; Rosenthal *v.* Martin Bank, U. S. C. C. (1879), 34 Am. Rep. 238; Dickinson *v.* Coates, 79 Mo. 250; Merchants' Nat. Bank *v.* Coates, 79 Mo. 258 (overruling Senter *v.* Continental Bank, 7 Mo. App. 532; McGrade *v.* German Sav. Inst., 4 Mo. App. 330; Zelle *v.* German Sav. Inst., 4 Mo. App. 401); Mayer *v.* Chattahoochie Nat. Bank, 51 Ga. 325; Harrison *v.* Wright, 100 Ind. 515; First Nat. Bank *v.* Gish, 72 Pa. St. 13; Atty.-Gen. *v.* Continental L. Ins. Co., 71 N Y. 330; Simmons *v.* Cincinnati Sav. Soc., 31 Ohio St. 457.

opinion may prevail in respect to the right of the holder to sue the bank.

The most serious objection which has been raised to the assignment theory, is that to constitute an equitable assignment of money, by means of an order, the order must direct the payment out of a particular fund and not generally out of any to be received.[1] In equity an assignment will be valid whenever the thing assigned is so described as that it can be identified. It matters not whether it be in existence at the time of assignment, or it is only a future possibility or expectancy.[2] So, whether the funds drawn against be in possession of the bank at the time that the check is issued, or they are to be received subsequently, the fact that the check is drawn against a particular bank or or banker, would seem to be a sufficient particularization of the fund, in order to work an equitable assignment *pro tanto* of the fund on deposit. It is probably rare that there is a more particular description of the fund in a general assignment for the benefit of creditors; and yet no one would question the right of such an assignee to draw out the money, so far as the bank is concerned.

[1] In Loyd et al. *v.* McCaffrey, 46 Pa. St. 410, Strong, J., said: "It cannot be maintained that Taylor's check, without more, amounted to an equitable appropriation of the funds in the hands of the banker to whom it was addressed. To make an order or draft an equitable assignment it must designate the fund upon which it is drawn." See to the same effect Phillips *v.* Stagg, 2 Edw. Ch. 108; Harrison *v.* Williamson, 2 Edw. Ch. 430; Chapman *v.* White, 6 N. Y. 412.

[2] "To make an assignment valid at law, the thing which is the subject of it must have actual or potential existence at the time of the grant or assignment. But courts of equity will support assignments, not only of *choses in action* and of contingent interests and expectancies, but also of things which have no actual or potential existence, and rest in mere possibility; not indeed as a present positive transfer, operative *in præsenti*, for that can only be a thing *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*." Story's Eq. Jur., § 1040.

The liability of the bank is, of course, restricted only to such cases where the check has not been countermanded. The agreement of the bank or banker, which forms a part of the contract of deposit, and which is claimed to pass with the check to the checkholder, is to pay the check, if there are sufficient funds in its possession and under its control at the time of presentment and demand. For this reason, the bank cannot be compelled to pay when payment has been countermanded by the drawer before presentment of the check by the holder; because countermanding is, so far as the bank is concerned, equivalent to another disposition of the money, which, having taken place before presentment, takes precedence; and whether the checkholder still has any interest in the fund depends upon the question whether the check works an assignment as against the drawer. This is but the natural consequence of the leading proposition. If the check works an assignment in respect to the drawee, it must have the same effect against the drawer and his privies.[1] The holder of the check, therefore, can claim the right to appropriate the funds, even against other creditors and a general assignee for the benefit of creditors; for creditors and general assignees can only claim what belongs to the debtor. It being, however, an equitable assignment, and the thing assigned being identified simply as the indebtedness of the drawee to the drawer, it can only be enforced while the fund remains in a condition to be identified. Should the fund be innocently (*i.e.*, as to the drawee) paid over to the drawer or to his assigns, it loses its identity, unless the identical sum can be traced and discovered in the hands of

[1] This is conceded in very many cases which deny that the checkholder cannot sue the bank. See Bank of Republic *v.* Millard, 10 Wall. 152; Robinson *v.* Hawkes, 9 Q. B. 52; Bell *v.* Alexander, 21 Gratt. 6; German Sav. Inst. *v.* Adae, 8 Fed. Rep. 106; Matter of Brown, 2 Story, 502; Morrison *v.* Bailey, 5 Ohio St. 13.

the drawer or assignee, and the check is consequently deprived of its value as an assignment.[1]

Whether the check is such a complete assignment of the drawer's interest as that, after presentment, where the check had been previously countermanded, the drawee pays the money to the drawer at his peril, has never been determined by any adjudication. It is settled that he can refuse to honor the check, but does the countermand relieve him of all obligation to the holder; or does it place him in the position of a stakeholder, and compel him to retain the fund for the benefit of whichever of the two shows himself entitled thereto? It would be hard to expect a bank in every case of countermanded checks to hold the funds, and become a party to suits on the same. It is likely that this position would not be assumed even by those courts which are inclined to push the assignment theory to the utmost limit.

The cases which deny the right of the checkholder to sue the bank[2] are by far more numerous than those which recognize his right.[3] And, although it is not difficult to demonstrate that the ruling of the minority of the courts is more rational and more consistent with the general principles of the law, in order to secure the much desired uniformity of rules throughout the United States, in respect to commercial law, it may be best for the minority to yield to the majority, on the ground that *communis error facit jus.*

§ 453. **Right of bank to offset amount due by checkholder.** — The bank has no right to offset to the check-

[1] See Row *v.* Dawson, 1 Ves. sr. 331; Cowperthwaite *v.* Sheffield, 3 Comst. 243.

[2] See note 2, p. 738.

[3] Fogarties *v.* State Bank, 12 Rich. L. 518; Chicago Marine, etc., Ins. Co. *v.* Stanford, 28 Ill. 168; Brown *v.* Leckie, 43 Ill. 500; Munn *v.* Burch, 25 Ill. 35; Union Nat. Bank *v.* Oceana Co. Bank, 80 Ill. 212; Roberts, *v.* Austin, 26 Iowa, 316; Lester *v.* Given, 8 Bush, 358.

holder's claim of payment any amount that the checkholder might owe the bank, the liability of the drawer and other parties to the check being conditional upon the payment of the amount of the check to the lawful holder.[1]

§ 454. **Overchecks.** — It has been frequently said to be a fraud on the bank for a depositor to overdraw his account with the bank, since the bank is inclined to repose confidence in its depositors and to honor their checks without examining the condition of their accounts.[2] But whether it be a fraud or not, it is certain that the depositor has no right, without special authority from the bank, to overdraw his account. Nor has any bank officer the right to honor an overcheck, without an express authority from the bank.[3] But the bank has the right, through its board of directors, to authorize an overdraw.[4] An overdraw is in the nature of a loan from the bank to the drawer.

§ 455. **Actual and presumptive rights and liabilities of the drawer of a check.** — A check is no evidence of the liability of the drawer, until it is shown that it has been presented for payment and dishonored. But when this is shown the drawer may be held liable on the check, without direct proof of consideration.[5] The law presumes that the check was given in satisfaction of some debt due by the drawer; and in order to hold the payee liable on it for a loan, it must be shown affirmatively that the check was

[1] Brown *v.* Leckie, 43 Ill. 501.

[2] See cases cited in § 445. See also True *v.* Thomas, 16 Me. 36; Morse on Banking, 318.

[3] Martin *v.* Morgan, Gow. 123; 1 B. & B. 289; 3 Moore, 635.

[4] Ballard *v.* Fuller, 32 Barb. 68; Mahoney Mining Co. *v.* Anglo-Cal. Bank, 104 U. S. (1882) 192.

[5] Fleming *v.* McClain, 13 Pa. St. 177; Pearce *v.* Davis, 1 Moo. & R. 365; Hoyt *v.* Seeley, 18 Conn. 357; Mauran *v.* Lamb, 7 Cow. 176; Conroy *v.* Warren, 3 Johns. 259.

given as a loan.[1] The check, in that case, is itself evidence of the amount of the loan.[2]

In the hands of the drawer, the check is presumptively a receipt for money paid to the payee, where the check is payable to order, without further proof of payment to the payee or his order. But if the check is payable to bearer, it is only evidence of the fact that money has been paid out by the bank on the check, and charged to the account of the drawer; and in order to make it evidence of the receipt of money by the payee it must be shown affirmatively that the money was paid to the person who is alleged to have received payment by the check.[3]

But the check is never evidence of the payment of any particular account, without proof of the special consideration.[4]

In the hands of the bank the check is presumptive evidence of the facts, that the bank held funds of the drawer on deposit, and that it had paid out of them the amount of the check to the holder. To import a loan, it must be

[1] Cary, Exr., *v.* Gerish, 4 Esp. 9; Huntzinger *v.* Jones, 60 Pa. St. 170; Patten *v.* Ash, 7 Serg. & R. 116; Headley *v.* Reed, 2 Cal. 322; Yates *v.* Shepherdson, 39 Wis. 173; Connelly *v.* McKean, 64 Pa. St. 118; Terry *v.* Ragsdale, 33 Gratt. 348; Graham *v.* Cox, 2 C. & K. 702; Thompson *v.* Pitman, Fost. & F. N. P. 339; 2 Parsons' N. & B. 84. But there is no presumption that the check was a gift; it is always presumed to be a loan (Baker *v.* Williamson, 4 Pa. St. 456; Huntzinger *v.* Jones, 60 Pa. St. 170), unless, possibly, when the drawer and payee are nearly related.

[2] Healy *v.* Gilman, 1 Bosw. 235.

[3] *Checks payable to order*, see Egg *v.* Barnett, 3 Esp. 196; Connelly *v.* McKean, 64 Pa. St. 113; Thompson *v.* Pitman, 1 Fost. & F. N. P. 339. *Checks payable to bearer*, People *v.* Baker, 20 Wend. 602; Mountford *v.* Harper, 16 M. & W. 825; Lloyd *v.* Sandilands, Gow. 13; Patten *v.* Ash, 7 Serg. & R. 116; People *v.* Howell, 4 Johns. 296; Pearce *v.* Davis, 1 Mood. & R. 365. If the check is payable to one, without words of negotiability, it seems that it is not evidence that the payee received the money, unless his indorsement is on the check, Fleming *v.* McClain, 13 Pa. St. 177; although it is doubtful whether the bank can require indorsement of a check not payable to order. 2 Parsons' N. & B. 83.

[4] Aubert *v.* Walsh, 4 Taunt. 293.

proven that the drawer had nothing to his credit to draw against.[1]

As soon as the account of the depositor has been debited with the cancelled checks drawn by him against his deposit and balanced, he is entitled by the custom of the banks to the return of the checks, to be kept by him as vouchers of payments in liquidation of his own debts. But until the account has been balanced, and the debits passed upon and approved by the depositor, the bank is entitled to the cancelled checks as evidence of its payments on account of the depositor.[2]

§ 456. **Payment by checks.** — Where a check is transferred in settlement of a debt, the implication of law is that it is not to constitute an *absolute* discharge of the debt, until the check is presented by the creditor and paid or certified on such presentment.[3] And so strong is this implication, that the holder of a bill or note is not obliged to give up the bill or note, until the check, which he receives in payment, has been paid.[4]

[1] Conway *v.* Case, 22 Ill. 127; Fletcher *v.* Manning, 12 M. & W. 571; Thurman *v.* Van Brunt, 19 Barb. 409; Lancaster Bank *v.* Woodward, 18 Pa. St. 361; Healy *v.* Gilman, 1 Bosw. 235; Morse on Banking, 290, 291.

[2] Matter of Brown, 2 Story, 512; Burton *v.* Payne, 2 C. & P. 520; Morse on Banking, 291; Regina *v.* Watts, 2 Den. C. C. 14. In the case of an overdraw, it must be made good before the depositor is entitled to the canceled check. 2 Daniel's Negot. Inst., § 1649; Morse on Banking, 293.

[3] People *v.* Baker, 20 Wend. 602; Ocean Tow Boat Co. *v.* Ship Ophelia, 11 La. Ann. 28; Phillips *v.* Bullard, 58 Ga. 256; Tapley *v.* Marstens, 8 T. R. 451; Blair & Hoge *v.* Wilson, 28 Gratt. 165; Currie *v.* Misa, L. R. 10 Exch. 153; Small *v.* Franklin Mining Co., 99 Mass. 277; Bradford *v.* Fox, 38 N. Y. 289; Smith *v.* Miller, 43 N. Y. 151; 52 N. Y. 546; Davison *v.* City Bank, 57 N. Y. 82; Sweet *v.* Titus, 11 N. Y. S. C. (4 Hun) 639; Everett *v.* Collins, 2 Camp. 515; Hearth *v.* Rhodes, 66 Ill. 351.

[4] Barnett *v.* Smith, 30 N. H. 256; Moore *v.* Barthrop, 1 B. & C. 5; Ward *v.* Evans, 12 Mod. 521; Taylor *v.* Williams, 11 Met. 44; People *v.* Baker, 20 Wend. 602; Hansard *v.* Robinson, 7 B. & C. 90; Pearce *v.* Davis, 1 Mood & R. 365. A check is said to be paid, when it has been re-

Although it was once held to be the custom in London for agents, who receive commercial paper for collection, to deliver up the paper on receipt of the obligor's check, and that the agent could do this without assuming any responsibility for loss in consequence of the dishonor of the check;[1] it is now the rule of law, both in England and in the United States, that agents act at their peril if they part with the commercial paper sent to them for collection on the receipt of the obligor's check, or at any time before they have received payment in the legal tender of the country.[2] And the same rule applies, although the check had been certified before its delivery to the payee or holder; the certification only having the effect in that case of increasing its currency by adding the liability of the bank to that of the drawer.[3]

ceived by the bank and the amount of it is passed to the credit of the payee or holder. Nat. Gold Bank *v.* McDonald, 51 Cal. 64.

[1] Russell *v.* Haskey, 6 T. R. 12.

[2] Chitty on Bills (13th Am. ed.) [*369], 415; Turner *v.* Bank of Fox Lake, 3 Keyes, 425; Rothbun *v.* Citizens' Steamboat Co., 76 N. Y. 376; Smith *v.* Miller, 43 N. Y. 171; 52 N. Y. 546; Whitney *v.* Essen, 99 Mass. 110.

[3] Bickford *v.* First Nat. Bank, 42 Ill. 238; Rounds *v.* Smith, 42 Ill. 245; Brown *v.* Leckie, 43 Ill. 497.

CHAPTER XXIV.

UNITED STATES TREASURY NOTES, BILLS OF CREDIT, AND BANK NOTES.

SECTION 460. Paper money or currency.
461. United States treasury notes.
462. United States silver and gold certificates.
463. Bills of credit.
464. Bank notes — Post-notes.
465. When bank notes are overdue — Statute of limitations.
466. Liability of transferrer of bank notes.
467. Lost or destroyed bank notes.
468. National bank notes.

§ 460. **Paper money or currency.** — The demands of commerce have extended beyond the requirement of gold and silver coin, and ordinary commercial paper, viz.: bills of exchange, promissory notes and checks; and something is demanded which is more easily transported than coin, and yet has to a greater degree than ordinary commercial paper the characteristics of money. This want is supplied by the use of government and bank promissory notes, payable on demand, and so constructed as to be capable of almost indefinite circulation. All species of paper money or currency are negotiable, and are transferred by delivery. We will now explain the several kinds of this class of paper, which are now found in use.

§ 461. **United States treasury notes.** — The highest and the most important kind of paper money in this country is the United States treasury note. It differs very little in form from the ordinary promissory note, payable on demand, except in respect to the texture of the paper on which it is

printed. A very fine paper of peculiar texture is used in order to render counterfeiting much more difficult; and this is found to be the case with all kinds of paper money or currency.

The treasury note differs from other kinds of paper money, in the fact that it is made by statute legal tender for all public and private debts. The power of the United States, to give to its treasury notes the character of legal tender, has been very seriously questioned, and in Hepburn *v.* Griswold[1] the Supreme Court of the United States pronounced the acts of Congress of 1862–3, which made these notes legal tender unconstitutional, because it involved the exercise of a power, which was not granted by the Constitution to the United States government. This decision was overruled by the same court in the Legal Tender Cases[2] on the ground that the power to make treasury notes legal tender may be implied from the powers to borrow money and to carry on war. The acts of '62–63 were declared to be constitutional as a war measure. Finally Congress passed another act, in 1878, giving to the treasury notes the character of legal tender, independently of the exigencies of war, and the Supreme Court of the United States declared the act to be constitutional.[3]

§ 462. **United States silver and gold certificates.**—Another species of government obligation which circulates as money, is the United States silver or gold certificate. The paper certifies "that there have been deposited in the treasury of the United States —— silver (gold) dollars, payable to bearer on demand." The certificate has every

[1] 8 Wall. 603.

[2] 12 Wall. 457.

[3] Juillard *v.* Greenman, 110 U. S. 421. For a full discussion of the constitutionality of the law making the United States treasury notes legal tender, see Tiedeman's Limitations of Police Power, § 90.

other quality of currency, except that is payable in a particular kind of coin, gold or silver, and it is not legal tender.

§ 463. **Bills of credit.** — Bills of credit is the name used in the Constitution of the United States to describe all kinds of government obligations which are intended to circulate as money, whether they are legal tender or not, and also whether they bear interest or not.[1] The tenth section of the first article of the Constitution provided that no State shall "emit bills of credit." But it is held that this provision does not prevent the States from authorizing banking corporations to issue bills of credit, and this power has been frequently exercised.[2] Of course, bonds issued by the State are not considered to be bills of credit.[3]

§ 464. **Bank-notes — Post-notes.** — These are the promissory notes of an incorporated bank, which are intended to circulate as money. Bank-notes and bank-bills are synonymous terms.[4] Bank-bills differ so little from an ordinary promissory note, that in an indictment for the forgery of one, it may be described as a promissory note.[5]

[1] Craig *v.* State of Missouri, 4 Pet. 411; City Nat. Bank *v.* Mahan, 21 La. Ann. 753. But it has been held that the government's guaranty of the notes of a bank, of which the State is the principal stockholder, is not a bill of credit in the constitutional meaning of the term, even if a fund has been appropriated to their redemption. Darrington *v.* Alabama, 13 How. 16.

[2] Briscoe *v.* Bank of Kentucky, 11 Pet. 328; Woodruff *v.* Trapnall, 10 How. 203; Darrington *v.* Alabama, 13 How. 15–17; Owen *v.* Branch Bank, 3 Ala. 258; Curran *v.* Arkansas, 15 How. 304.

[3] McCoy *v.* Washington Co., 3 Wall. jr. 389. And they do not become bills of credit, because they are made receivable for dues. See Antoni *v.* Wright, 22 Gratt. 833; Wise *v.* Rogers, and Maury *v.* Rogers, 24 Gratt. 169.

[4] Eastman *v.* Commonwealth, 4 Gray, 416.

[5] Commonwealth *v.* Thomas, 10 Gray, 483; Commonwealth *v.* Simonds, 14 Gray, 59.

They are payable to bearer and on demand. If they are made payable at some future time they are called POST-NOTES. The bank, which is authorized to issue bank-bills, can include post-notes in the issue.[1] The post-note does not differ at all from bank-notes in respect to the rules which govern their construction.[2]

The rules which require demand and notice, in the case of negotiable promissory notes, do not apply to them;[3] although it seems that the post-notes are payable with days of grace.[4]

Bank-bills are usually required to be signed by the president and cashier. But, of course, the charter or by-laws of the bank may require the signatures of other officers.

Bank-notes are not legal tender; but if they are not objected to, they may be tendered in payment of debts, and the tender will have the same effect as would the tender of lawful money. But the creditor may refuse to receive bank-bills; and in that case the debtor must tender payment in coin or treasury notes, even when the bank itself is the creditor.[5] But it is sometimes provided by statute that bank-notes are receivable for all dues to the bank which issues them.[6] Bank-bills are so far considered money, that

[1] Campbell *v.* Miss. Union Bank, 6 How. (Miss.) 625.

[2] Fulton Bank *v.* Phœnix Bank, 1 Hall, 562.

[3] Key *v.* Knott, 9 Gill & J. 342.

[4] Staples *v.* Franklin Bank, 1 Met. 43; Perkins *v.* Franklin Bank, 21 Pick. 483; Sturdy *v.* Henderson, 4 B. & Ald. 592.

[5] Thomas *v.* Todd, 6 Hill, 340; Codman *v.* Lubbock, 5 Dowl. & R. 289; Hallowell, etc., Bank *v.* Howard, 13 Mass. 235; Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; Wright *v.* Reed, 3 T. R. 554; Owenson *v.* Morse, 7 T. R. 64; Jefferson Co. Bank *v.* Chapman, 19 Johns. 322; Armsworth *v.* Scotten, 29 Ind. 495; Coxe *v.* State Bank, 3 Halst. 172. See Morrill *v.* Brown, 15 Pick. 173; Edmunds *v.* Digges, 1 Gratt. 359; Bayard *v.* Shunk, 1 Watts & S. 92; Bradley *v.* Hunt, 5 Gill & J. 58; Pierson *v.* Wallace, 2 Eng. (Ark.) 282; Bullard *v.* Bell, 1 Mason, 243; United States Bank *v.* Bank of Georgia, 10 Wheat. 333.

[6] Niagara Bank *v.* Roosevelt, 9 Cow. 409; Dunlap *v.* Smith, 12 Ill.

they will pass by will under the bequest of money or cash.[1] And where the statute authorizes the taking of money in execution, bank-bills may also be levied upon.[2]

Bank-notes are, like all other species of commercial paper, negotiable,[3] and the *bona fide* holder can compel payment to him, although they are proven to have been stolen from the rightful owner. The mere possession of the note is *prima facie* evidence of *bona fide* ownership, and the presumption is so strong that it cannot be overturned by showing that the holder was guilty of negligence in taking the note without inquiry.[4] In the case of ordinary bills and notes, the proof of the fact that the paper had been stolen or obtained by fraud, shifted the burden of proof to the holder, who was then required to show affirmatively, that the paper was obtained in good faith and in the usual course of business.[5] And the same rule seems to be applied in England to bank-notes.[6] But in the United States, in consequence of the rapid circulation of bank-notes as money, and the great obstruction to their circulation it would be to require the holder to prove affirmatively that he had received every bank-note in his possession in good faith and for value, the courts have discarded the general rule, and maintain that the burden of proof is always on the other party to show want of good faith.[7]

399; Exchange Bank *v.* Knox, 19 Gratt. 746; Moise *v.* Chapman, 24 Ga. 249; Union Bank *v.* Ellicott, 6 Gill & J. 363.

[1] Stuart *v.* Bute, 11 Ves. 662; Miller *v.* Race, 1 Burr. 457.

[2] Morrill *v.* Brown, 15 Pick. 173; Wildes *v.* Nahant Bank, 20 Pick. 352; Spencer *v.* Blaisdell, 4 N. H. 198; Lovejoy *v.* Lee, 35 Vt. 430.

[3] Miller *v.* Race, 1 Burr. 452.

[4] Solomons *v.* Bank of England, 13 East, 135; Lowndes *v.* Anderson, 13 East, 130; Raphael *v.* Bank of England, 17 C. B. 161; 33 Eng. L. & Eq. 276; City Bank *v.* Farmers' Bank, Taney C. C. 119.

[5] See *ante*, § 303.

[6] De la Chaumette *v.* Bank of England, 9 B. & C. 208. See also Solomons *v.* Bank of England, 13 East, 135.

[7] Worcester Co. Bank *v.* Dorchester, etc., Bank, 10 Cush. 488; Wyer

But in order that the holder can claim to be a *bona fide* holder, he must have taken the notes in the usual course of business. He cannot claim to be a *bona fide* holder, if the notes are pledged to him as security for a debt, with the agreement that they are not to be put into circulation.[1]

§ 465. **When bank-notes are overdue — Statute of limitations.** — Inasmuch as bank-notes are intended for indefinite circulation, at no time can they be really called stale or overdue, as is the case with other commercial paper, payable on demand.[2] And they are not overdue, because they have been presented to the bank and paid and afterwards re-issued.[3] But if they have been presented and protested for non-payment, it has been held that any one acquiring them afterwards will take them subject to the equitable defenses, whether he knew of the dishonor or not.[4]

The statute of limitation cannot run against the bank-note, as long as it is in circulation. But, it is held that, as soon as it ceases to circulate as currency, the statute does begin to run against the right of action on it.[5]

§ 466. **Liability of transferrer of bank-notes.** — Although bank-notes may be transferred by indorsement,[6] it is not usual or necessary to do so, the transfer by delivery being customary and all-sufficient. But notwithstanding

v. Dorchester, etc., Bank, 11 Cush. 51; Louisiana Bank *v.* Bank of United States, 9 Mart. (La.) 398. See also Olmstead *v.* Winstead Bank, 32 Conn. 278; New Hope, etc., Bridge Co. *v.* Perry, 11 Ill. 467.

[1] Davenport *v.* City Bank, 9 Paige, 12.

[2] Bullard *v.* Bell, 1 Mason, 243; Solomons *v.* Bank of England, 13 East, 135.

[3] 2 Parsons' N. & B. 95.

[4] Burroughs *v.* Bank of Charlotte, 70 N. C. 284.

[5] Kimbro *v.* Bank of Fulton, 49 Ga. 418; 2 Parsons' N. & B. 95; Morse on Banking, 402.

[6] Corbett *v.* Bank of Smyrna, 2 Harr. (Del.) 235.

there is no indorsement, the transferrer, nevertheless, warrants that the note is genuine and not a counterfeit; and if it proves to be a counterfeit, the loss falls on the transferrer, and the debt, in payment of which the note was transferred, remains unsatisfied.[1] But the party who receives counterfeit bank-notes loses his remedy against the transferrer, if he does not give notice of its counterfeit character within a reasonable time after receiving the note. What is a reasonable time depends upon the circumstances of each particular case:[2] in the light of the surrounding circumstances, the delay in the giving notice has been held to be unreasonable when it was six months,[3] four months,[4] forty days,[5] and fifteen days.[6]

The transferrer will, of course, be bound by any express warranty of the solvency of the bank which issued the note.[7] But the authorities are divided on the question whether there is on the part of the transferrer any implied warranty of the solvency of the bank. Some of the cases hold that there is an implied warranty of solvency for the reason that by transfer of bank-notes the transferrer imports that they have the value represented on the face; and

[1] Ramsdale *v.* Horton, 3 Pa. St. 330; Markle *v.* Hatfield, 2 Johns. 455; Edmund *v.* Digges, 1 Gratt. 359; Jones *v.* Ryde, 5 Taunt. 488; Pindall *v.* N. W. Bank, 7 Leigh, 617; Young *v.* Adams, 6 Mass. 182; Mudd *v.* Reeves, 2 Harr. & J. 368; Eagle Bank *v.* Smith, 5 Conn. 71. It seems that the person, who innocently pays to or deposits with a bank counterfeits of its own notes, will not be liable to the bank for the same, on the ground that a bank ought to be able to detect counterfeits of its own notes. United States Bank *v.* Bank of Georgia, 10 Wheat. 333.

[2] Simms *v.* Clark, 11 Ill. 137.

[3] Raymond *v.* Barr, 13 Serg. & R. 318.

[4] Pindall *v.* N. W. Bank, 7 Leigh, 617.

[5] Thomas *v.* Todd, 6 Hill, 340.

[6] Gloucester Bank *v.* Salem Bank, 17 Mass. 44.

[7] Commonwealth *v.* Stone, 4 Met. 43; Gilman *v.* Peck, 11 Vt. 516; Wainwright *v.* Weber, 11 Vt. 576; Corbet *v.* Bank of Smyrna, 2 Harr. (Del.) 235; Aldrich *v.* Jackson, 5 R. I. 218; Frontier Bank *v.* Morse, 22 Me. 88.

they are not of that value, if the bank is then insolvent.[1] On the other hand, the implied warranty of solvency is denied by other authorities, on the ground that the bank-note is transferred always on its own intrinsic value, and the transferee takes the risk of any depreciation in value on account of the insolvency of the bank.[2] But the authorities are agreed that the transferrer is liable, if he transfers the bill of an insolvent bank, when he knows that the bank is insolvent.[3]

If the transferrer does warrant the solvency of the bank, in order that he may be held bound on his warranty, the transferee must either put the note in circulation, or present it to the bank for payment, and notify the transferrer of the insolvency of the bank, within a reasonable time.[4]

§ 467. **Lost or destroyed bank-notes.** — If the whole note is lost, the loser must bear the loss, unless he can recover the note, for the reason that the bank will be

[1] Houghton *v.* Adams, 18 Barb. 545; Fogg *v.* Lawyer, 9 N. H. 365; Owenson *v.* Morse, 7 T. R. 64; Beeching *v.* Gower, Holt. N. P. 313; Thomas *v.* Todd, 6 Hill, 340; Ward *v.* Evans, 12 Mod. 521; Canridge *v.* Allenby, 6 B. & C. 373; Frontier Bank *v.* Morse, 22 Me. 88; Lightbody *v.* Ontario Bank, 11 Wend. 9; 13 Wend. 101; Williams *v.* Smith, 2 Barn. & Ald. 496; Timmins *v.* Gibbons, 18 Q. B. 722; Rogers *v.* Langford, 1 C. & M. 637; Harley *v.* Thornton, 2 Hill (S. C.), 509; Turner *v.* Stones, 1 Dow. & L. 122; Gilman *v.* Peck, 11 Vt. 516; Westfall *v.* Braley, 10 Ohio St. 188; Townsends *v.* Bank of Racine, 7 Wis. 185; Williams *v.* Smith, 2 Barn. & Ald. 496.

[2] Bayard *v.* Shunk, 1 Watts & S. 92; Lowery *v.* Murrell, 2 Port. (Ala.) 286; Ware *v.* Head, 3 Head, 609; Edmund *v.* Digges, 1 Gratt. 359; Corbet *v.* Bank of Smyrna, 2 Harr. (Del.) 235; Scruggs *v.* Gass, 8 Yerg. 175.

[3] Penn *v.* Harrison, 3 T. R. 759; Canridge *v.* Allenby, 6 B. & C. 373; 9 Dow. & R. 391.

[4] Canridge *v.* Allenby, 6 B. & C. 373; 6 Dow. & R. 39; Owenson *v.* Morse, 7 T. R. 64; Ward *v.* Evans, 12 Mod. 521; Williams *v.* Smith, 2 Barn. & Ald. 496; Timmins *v.* Gibbons, 18 Q. B. 722; Rogers *v.* Langford, 1 Cromp. & M. 637; Turner *v.* Stones, 1 Dow. & L. 122.

bound to pay it to any *bona fide* holder.[1] If the note is completely destroyed, the owner may recover of the bank by proving the destruction of certain specific notes, and giving the bank a bond of indemnity against any future presentment of them for payment.[2]

When a part of the note has been lost or destroyed, the holder can recover the value of the whole note from the bank, upon proof of the facts. Some of the authorities maintain that, in these cases, a bond of indemnity may be required.[3] But the other authorities maintain what appears to be the better doctrine, that no bond of indemnity can be required, on the ground that "the payor will never be liable again, since the holder takes the missing half with notice of prior equities."[4] The holder does not recover on the half note; he must show that he lost the other half. And the note must be so specifically described that the other half may be readily identified.[5]

It was a somewhat common practice for one, in transmitting a bank-note by mail, to cut it in two, and send the two halves in separate letters, or by different mails.[6] And

[1] Hinsdale *v.* Bank of Orange, 6 Wend. 378. But see *contra* Waters *v.* Bank of Georgia, Charlt. 193; Robinson *v.* Bank of Darren, 18 Ga. 65.

[2] Tower *v.* Appleton, 3 Allen, 387; Carey *v.* Green, 7 Ga. 79. The bond of indemnity may be required even if the destruction of the notes is clearly established, the bank not being in a position to discover the falsity of the testimony, if it be false. Wade *v.* N. O. Canal, etc., Co., 8 Rob. (La.) 142; Morse on Banking, 410. See Welton *v.* Adams, 4 Cal. 38, where the same rule was applied to a certificate of deposit. But see *contra* Bank of Mobile *v.* Meagher, 33 Ala. 622.

[3] Commercial Bank *v.* Benedict, 18 B. Mon. 311; Bank of Va. *v.* Ward, 6 Munf. 169; Farmers' Bank *v.* Reynolds, 4 Rand. 186; Story on Bills, § 448; Mayor *v.* Johnson, 2 Camp. 325.

[4] 2 Parsons' N. & B. 313; Union Bank *v.* Warren, 4 Sneed, 171; Patten *v.* State Bank, 2 Nott & McC. 464; Bullet *v.* Bank of Pa., 2 Wash. C. C. 172; Martin *v.* Bank of U. S., 4 Wash. C. C. 253; Bank of U. S. *v.* Sill, 5 Conn. 112.

[5] 2 Parsons' N. & B. 313; Bank of Va. *v.* Ward, 6 Munf. 166.

[6] Williams *v.* Smith, 2 B. & Ald. 496; Redmayne *v.* Burton, 9 C. B.

it is held that the bank has not the right to refuse to pay notes that have been cut into parts.[1] The courts of equity have jurisdiction in such cases, although there may be an action at law.[2]

§ 468. **National bank-notes.** — The national bank-note has superseded the State bank-note as a circulating currency, although the power of the States to authorize banks, chartered under State laws, to issue bank-notes for general circulation, has not been taken away or abridged. The national bank-note differs from the State bank-note in the security provided against loss from the failures of the banks. The notes are secured by the deposit of United States bonds with the government at Washington, and, based upon this security, the United States government guarantees the payment of every national bank-note. The financial standing of the national bank-note thus differs in nothing from the United States treasury note, except that the latter is a legal tender and the former is not.

(N. S.) 519; Commercial Bank *v.* Benedict, 18 B. Mon. 307; 2 Parsons' N. & B. 314; Chitty on Bills [* 259], 294.

[1] United States Bank *v.* Sill, 5 Conn. 106; Martin *v.* Bank of United States, 4 Wash. C. C. 253; 2 Parsons' N. & B. 314.

[2] Allen *v.* State Bank, 1 Dev. & Bat. Eq. 3.

CHAPTER XXV.

COUPON BONDS.

SECTION 471. Definition and nature of coupon bonds.
472. Who may execute coupon bonds.
473. Negotiability of coupon bonds — Rights of the holder of the same.
474. To whom payable — Transfer by indorsement or delivery.
475. The formal parts of bond and coupon — Seal not necessary.
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479. When consideration paid to corporation for invalid bond may be recovered.
480. When municipal corporation has power to issue negotiable coupon bonds.
481. For what objects may municipal corporations be empowered to issue bonds.
482. What defenses may be set up against *bona fide* holders of municipal bonds.

§ 471. **Definition and nature of coupon bonds.** — A coupon bond is a primary obligation, in the nature of a promissory note, promising to pay a sum of money on a day certain in the future, to which are attached certain other obligations called coupons,[1] which call for the payment of the installments of interest on the principal debt, as they fall due; each coupon representing an installment of interest, and payable when the installment of interest falls due. The coupon may be severed from the bond at or before its maturity, and when severed may and does pass as a

[1] They are called coupons from the French verb, *couper*, to cut, because they are so attached that they may be cut off, whenever they fall due. 2 Daniel's Negot. Inst., § 1489.

separate and independent security.[1] It matters very little what the form of the coupon is, it practically amounts to nothing more than a promissory note, essentially differing from the ordinary promissory note only in being payable without grace.[2] Sometimes the coupon is in the form of a draft or order on a bank; but in that case it differs from a bill of exchange in that it need not be presented for acceptance.[3]

Notwithstanding the possibility of the severance of the coupon from the bond, the relation between the two is so intimate that the power to issue the coupons is implied from the legislative authority to issue bonds.[4] And the mortgage which is given to secure the payment of the bond will cover each and every coupon, whether attached or detached, together with interest on the coupon.[5]

[1] Clark *v.* Iowa City, 20 Wall. 584; Thompson *v.* Lee County, 3 Wall. 327; City *v.* Lamson, 9 Wall. 477; Clarke *v.* Janesville, 10 Wis. 136; Rose *v.* City of Bridgeport, 17 Conn. 243; Railway *v.* Cleneay, 13 Ind. 161; Commonwealth *v.* Industrial Assn., 98 Mass. 12; Spooner *v.* Holmes, 102 Mass. 503; Arents *v.* Commonwealth, 18 Gratt. 776; Comrs. of Knox Co. *v.* Aspinwall, 21 How. 539; Town *v.* Culver, 19 Wall. 84; Beaver County *v.* Armstrong, 44 Pa. St. 63; Maddox *v.* Graham, 2 Metc. (Ky.) 56; Brainard *v.* N. Y. & H. R. R. Co., 25 N. Y. 496; Evertsen *v.* Nat. Bank of Newport, 11 N. Y. S. C. (4 Hun) 694; Langston *v.* S. C. R. R. Co., 2 S. C. 249; Nat. Ex. Bank *v.* Hartford R. R. Co., 8 R. I. 375.

[2] 2 Daniel's Negot. Inst., § 1490*a;* Arents *v.* Commonwealth, 18 Gratt. 773. But it has been held lately in New York that coupons are entitled to days of grace. Eversten *v.* Nat. Bank of Newport, 66 N. Y. 22. See Cooper *v.* Town of Thompson, 13 Blatchf. 434.

[3] Va. & Tenn. R. R. Co. *v.* Clay, cited from MSS. Special Court of Appeals of Va. in 2 Daniel's Negot. Inst., § 1489.

[4] Arents *v.* Commonwealth, 18 Gratt. 773.

[5] Beaver County *v.* Armstrong, 44 Pa. St. 63; Union Trust Co. *v.* Monticello, etc., R. R. Co., 63 N. Y. 314; Miller *v.* Rutland, etc., R. R., 4 Vt. 399; Gibert *v.* W. C. V. M., etc., R. R. Co., 33 Gratt. 599; Haven *v.* Grand Junction R. R. Co., 109 Mass. 88. The mortgage proceeds of sale in case of insufficiency are distributed *pro rata* according to the face value, among all the holders of the bonds and coupons, covered by the mortgage. Stanton *v.* A. & C. R. R. Co., 2 Woods C. C. 523; Ketchum *v.* Duncan, 96 U. S. 671; Pennock *v.* Coe, 23 How. 130; In re Regent's

§ 472. **Who may execute coupon bonds.** — The coupon bonds have become a very common commercial security, and they are issued very generally by the Federal and State governments,[1] by municipal and other public corporations;[2] by the territorial governments, and the municipal and other public corporations of the same;[3] and by all sorts of private corporations, such as railroads, canal companies, and the like.[4]

As a general rule, the coupon bonds are issued by corporations, both public and private, but not by individuals; and if any doubt exists as to the power of an individual to execute a negotiable coupon bond, it is caused by the facts that the coupon bond is sealed, and that according to the law merchant the commercial paper of an individual could not be sealed and yet retain its negotiable character.[5] In the case of the coupon bond, this rule of the law merchant was disregarded, because of the necessity or propriety of the use of the seal in executing the obligations of a corporation. But it has been held that the individual, as well as the corporation, may execute negotiable coupon bonds.[6]

Canal Iron Works Co., 3 Ch. Div. 43; Hodge's Appeal, 84 Pa. St. 359. But the coupons cannot share with the *bona fide* bond holders, where they have been taken up and paid by certain persons, who advanced the money for that purpose to the corporation which issued the bonds. Union Trust Co. *v.* Monticello & P. J. R. R. Co., 63 N. Y. 311. See Harbeck *v.* Vanderbilt, 20 N. Y. 398; Miller *v.* Rutland, etc., R. R. Co., 40 Vt. 399; Haven *v.* Grand Junction R. R. Co., 109 Mass. 88; James *v.* Johnson, 6 Johns. Ch. 423; Robinson *v.* Leavitt, 7 N. H. 100.

[1] See *ante*, § 132.

[2] See chapter on Municipal Corporations as Parties to Commercial Paper.

[3] National Bank *v.* County of Yankton, 101 U. S. 133, in which the bonds of Yankton county, Dakota, authorized by act of Congress to be issued in aid of a railroad, were held to be valid and binding upon the county.

[4] See § 117

[5] See *ante*, § 32.

[6] Simeon Leland in Bankruptcy, 6 Ben. 175, Blatchford, J., saying: "I think that on the authority of the decision of the highest courts of this

§ 473. **Negotiability of coupon bonds. — Rights of holder of the same.**— Although it was a rigid rule of the old law merchant that a seal destroyed the negotiability of commercial paper,[1] the modern demands of the commercial world for corporate securities, — accompanied by the highest evidence of its execution by the proper officers, viz., the seal of the corporation, — and the further fact that it was once held that a corporation could not act, except by and under its seal,[2] broke in upon the force of this rule, and created an exception in favor of the negotiability of corporate securities, notwithstanding they are under seal. It is now the law, in the United States, supported by an almost unbroken line of authorities,[3] that the coupon bond, when it contains the usual or equivalent words of negotiability, is for every purpose as negotiable as bills of exchange and promissory notes.[4]

State, and of the United States, the bonds and coupons in question are negotiable instruments, although issued by an individual under his seal, and not by a corporation, and are not specialties so as to make them subject, in the hands of their assignees, to equities existing against their assignor. Although under seal, they were issued, as shown on their face, to secure the payment of money on time; and they contain on their face expressions showing that they are expected to pass from one to another by delivery. Therefore, the attributes of commercial paper attach to them. Their character cannot be controlled or varied by the mere fact that their maker put a seal after his name (citing Brainard *v.* New York, etc., R. R. Co., 25 N. Y. 496; White *v.* Vermont R. R. Co., 21 How. 572; Mercy County *v.* Hacket, 1 Wall. 83). Such bonds and their coupons pass by delivery; a purchaser of them in good faith is not affected by want of title in their vendor, and the burden of proof on a question as to such good faith lies on the party who assails the possession."

[1] See *ante*, § 32.

[2] See *ante*, § 117.

[3] See *contra* Diamond *v.* Lawrence Co., 37 Pa. St. 353: "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us."

[4] White *v.* Vt. & Mass. R. R. Co., 21 How. 575; Moran *v.* Comrs. of Miami Co., 2 Black, 722; Mercer County *v.* Hackett, 1 Wall. 83; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Meyer *v.* Muscatine, 1 Wall. 382; Murray *v.* Lardner, 2 Wall. 110; Thompson *v.* Lee Co., 3 Wall. 227; Super-

In England in 1811, the bonds of the East India company were declared to be non-negotiable.[1] Immediately thereafter, Parliament enacted that such bonds were assignable and transferable by delivery.[2] Following the example thus set them by Parliament, the English courts applied the doctrine of negotiability to all sorts of coupon bonds.[3]

The fact that provision is made in the bond for its being "registered and made payable by transfer only on the books of the company," will not of itself destroy the negotiability of the bond.[4] But actual registration does.

The holder or purchaser of the coupon bond takes it, with all the rights and privileges of the purchaser of a bill of exchange or a promissory note; and he will be a *bona*

visors *v.* Schenck, 5 Wall. 772; Aurora City *v.* West, 7 Wall. 82; Comrs. of Manor *v.* Clark, 94 U. S. 279; First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87; Railway *v.* Cleneay, 13 Ind. 161; Clapp *v.* Cedar County, 5 Clarke, 15; Ringling *v.* Kohn, 4 Mo. App. 63; Lafayette Sav. Bank *v.* Stoneware Co., 4 Mo. App. 276; Barrett *v.* County Court, 44 Mo. 197; Craig *v.* City of Vicksburg, 31 Miss. 216; Society for Savings *v.* City of New London, 29 Conn. 174; Virginia *v.* Chesapeake & Ohio Canal Co., 32 Md. 501; Spooner *v.* Holmes, 102 Mass. 503; Hinckley *v.* Union Pac. R. R., 129 Mass. 52; Langston *v.* S. C. R. R. Co., 2 S. C. 248; San Antonio *v.* Lane, 32 Tex. 405; Consolidated Association *v.* Avegno, 28 La. 552; Durant *v.* Iowa County, 1 Woolworth C. C. 72; Blackman *v.* Lehman, 63 Ala. 519; State ex rel. Plock *v.* Cobb, 64 Ala. 128; Arents *v.* Commonwealth, 18 Gratt. 773; Clark *v.* Janesville, 10 Wis. 136; Mills *v.* Jefferson, 20 Wis. 50; Johnson *v.* County of Stark, 24 Ill. 75; Chapin *v.* Vt. & Mass. R. R. Co., 8 Gray, 575; Nat. Exch. Bank *v.* Hartford, etc., R. R. Co., 8 R. I. 379; Conn. Mut. Life Ins. Co. *v.* Cleveland, etc., R. R. Co., 41 Barb. 9; Bank of Rome *v.* Village of Rome, 19 N. Y. 24; Seybel *v.* Nat. Currency Bank, 54 N. Y. 288; Evertson *v.* Nat. Bank of Newport, 4 Hun (11 N. Y. S. C.), 695; 66 N. Y. 15; Morris Canal, etc., Co. *v.* Fisher, 1 Stock, 667; City of Elizabeth *v.* Force, 29 N. J. Eq. 587; Weith *v.* City of Wilmington, 68 N. C. 341.

[1] Glynn *v.* Baker, 1 East., 510.

[2] 51 Geo. III., ch. 64.

[3] Wookey *v.* Pole, 4 B. & Ald. 1; Gorgier *v.* Melville, 3 B. & C. 45; Lang *v.* Smith, 7 Bing. 284; Rumball *v.* Metropolitan Bank, 2 Q. B. Div. 194; Goodwin *v.* Roberts, L. R. 10 Exch. 76, 337.

[4] Savannah & Memphis R. R. Co. *v.* Lancaster, 62 Ala. 563.

fide holder, under the same circumstances, and be subject to the same defenses, as if his bond had been an unsealed bill or note.[1]

If the coupon is overdue when it is transferred, the purchaser takes it subject to all the equities.[2] But the fact that overdue coupons are attached to a bond, when the bond is sold and transferred, will not of itself affect the negotiability of the bond, if it was itself not yet due.[3] But the overdue coupon may, in connection with other facts or circumstances in the knowledge of the purchaser, be sufficient to put the purchaser on his inquiry.[4] And, of course, this would be the case, where it was stipulated in the bond that on default in the payment of any coupon the bond itself will be due and payable.[5]

§ 474. **To whom payable — Transfer by indorsement or delivery.** — Coupon bonds are usually made payable to bearer, and are transferable by delivery,[6] although they

[1] 2 Daniel's Negot. Inst., §§ 1502, 1503. See *ante*, chapter on Rights of *Bona Fide* Holder.

[2] Arents *v.* Commonwealth, 18 Gratt. 773; First Nat. Bank *v.* County Comrs., 14 Minn. 79; Ashurst *v.* Bank of Australia, 37 Eng. L. & Eq. 195; Evertsen *v.* National Bank, 66 N. Y. 22, 23, *semble*. See Bank of La. *v.* City of N. O., 5 Am. Law Reg. (N. S.) 555; Brown *v.* Davies, 3 T. R. 80; Rothschild *v.* Carney, 9 B. & C. 391; Hinckley *v.* Union Pac. R. R. Co., 129 Mass. 52. The presumption of law is, however, that the holder acquired the coupon *bona fide* and before maturity. City of Lexington *v.* Butler, 141 Wall. 295.

[3] Railway Co. *v.* Sprague, 103 U. S. 762, distinguishing the case of Parsons *v.* Jackson, 99 U. S. 434, and Cromwell *v.* County of Sac, 96 U. S. 58. See also Nat. Bank *v.* Kirby, 108 Mass. 497; Gilbough *v.* Norfolk, etc., Co., 1 Hughes, 410; Boss *v.* Hewitt, 15 Wis. 260; State ex rel. Plock *v.* Cobb, 64 Ala. 158. See *contra* 14 Minn. 77.

[4] Parsons *v.* Jackson, 99 U. S. 434.

[5] Mayor, etc., of Griffin *v.* City Bank, 58 Ga. 584; Walnut *v.* Wade, 103 U. S. 695.

[6] Brookman *v.* Metcalf, 32 N. Y. 591; Conn. Ins. Co. *v.* C. C. & C. R. R. Co., 41 Barb. 9; Mercer County *v.* Hackett, 1 Wall. 83; City of Kenosha *v.* Lamson, 9 Wall. 478; Roberts *v.* Bolles, 101 U. S. 122; Morris

may be made payable to the order of the person to whom they are issued, and in that case they could be transferred only by indorsement.[1]

Although it is necessary in ordinary commercial paper to give the name of the payee, or to describe him in some other way;[2] this is not necessary to the validity or to the negotiable character of a coupon bond. The coupon bond is designed to pass from hand to hand indefinitely, and it does not matter to know to whom it was first issued.[3]

But in order that the coupon bond may be transferable at all, it must contain words of negotiability. It is not necessary to employ the usual words, *or order or bearer*, but any other word which indicates the intention to permit its transfer will suffice, such as to the "holder;"[4] or to A. and his assigns, when the transfer must be by indorsement. Delivery is as essential to passing the title of coupon bonds, as of any other kind of commercial paper; and if possession

Banking & Canal Co. *v.* Lewis, 1 Beas. 323; Eaton & H. R. R. Co. *v.* Hunt, 20 Ind. 457; Carr *v.* Le Fevre, 27 Pa. St. 413; Johnson *v.* County of Stark, 24 Ill. 75; Supervisors of Mercer County *v.* Hubbard, 45 Ill. 139; Town of Eagle *v.* Kohn, 84 Ill. 292.

[1] City of Lexington *v.* Butler, 15 Wall. 295. The party transferring by indorsement assumes the customary liabilities of indorsers of commercial paper. Bonner *v.* City of New Orleans, 2 Woods C. C. 135; Jones on R. R. Securities, § 348. And whether the transfer be by delivery or by indorsement, the transferrer guarantees the genuineness of the bond, and is obliged to refund the consideration, if the bond should prove to be a forgery. Smith *v.* McNair, 19 Kan. 330; First Nat. Bank *v.* Peck, 8 Kan. 660. See chapters on Transfer in General, and Transfer by Indorsement.

[2] See *ante*, § 17.

[3] Woods *v.* Lawrence Co., 1 Black, 360; White *v.* Vermont, etc., R. R. 21 How. 575; Preston *v.* Hull, 23 Gratt. 613. See Eversten *v.* Nat. k of Newport, 66 N. Y. 19, 20.

[4] Arents *v.* Commonwealth, 18 Gratt. 750; County of Wilson *v.* National Bank, 103 U. S. 776; Iorter *v.* City of Janesville, 3 Fed Rep. 619.

[5] Brainard *v.* New York, etc., R. R. Co., 25 N. Y. 496; 10 Bosw. 832

is procured without a delivery, the rights of a *bona fide* holder will be the same as if it had been a bill or note.[1]

§ 475. **The formal parts of bond and coupon — Seal not necessary.** — The bond and coupons are generally printed on paper of very fine texture, more or less beautifully engraved. But in other respects, the bond differs in form very little from a promissory note. It and the coupons are usually signed by the president of the corporation, or the chief executive of the town or municipality, which issues them, and countersigned by the secretary, treasurer, cashier, or other clerk of the corporation, according to its by-laws, or the statutes "in such cases made and provided." These signatures may be either written or printed.[2] The coupon may take on any form: sometimes it is a promissory note;[3] at other times, a bill of exchange on the treasury of the corporation;[4] a draft or order, without naming any drawee;[5] a check,[6] and a mere due-bill or acknowledgment of indebtedness.[7]

It has been sometimes doubted whether a coupon bond would be unaffected by the absence of a seal.[8] But inasmuch as the seal was originally the only objection to the appli-

[1] Ledwick *v.* McKim, 53 N. Y. 315; Redlick *v.* Doll, 54 N. Y. 236. If coupons refer to bonds to which they were attached, the purchaser of a severed coupon is chargeable with notice of all that the bond contains. McClure *v.* Oxford Township, 94 U. S. 429; Selliman *v.* Railroad Co., 27 Gratt. 119.

[2] Lyde *v.* County, 16 Wall. 6; McKee *v.* Vernon County, 3 Dill. C. C. 210; Pennington *v.* Baehr, 65 Cal. 508. It has been held that if the bonds have been properly executed, it will not affect the validity of the coupons if they are signed by only one of the officers. Thayer *v.* Montgomery Co., 3 Dillon C. C. 389.

[3] Thompson *v.* Lee County, 3 Wall. 327.

[4] Moran *v.* Comrs. of Miami County, 2 Black, 722.

[5] Mercer County *v.* Hubbard, 45 Ill. 140.

[6] Arents *v.* Commonwealth, 18 Gratt. 753.

[7] Woods *v.* Lawrence County, 1 Black, 360.

[8] Mercer County *v.* Hackett, 1 Wall. 83.

cation to these bonds of the character and incidents of negotiability, it is difficult to see any reason why the absence of the seal would now change their character in any essential respect and this is now the ruling of the courts.[1]

Like other commercial paper, it is necessary to the negotiability of the bond, that the amount to be paid is certain. Any uncertainty in respect to the amount will destroy the negotiability of the bond.[2]

The parties to commercial paper have generally the unrestricted power to stipulate a place of payment in the paper; and, according to the weight of authority, the parties to coupon bonds are not hampered by any restrictions in that regard.[3] But it has been held in Illinois that a municipal corporation cannot, without express authority from the legislature, provide for the payment of its bonds and coupons at any other place than its treasury.[4]

The figures, denoting the number of the bond in a series, constitute no essential part of it, and an alteration of them will not affect the rights of a *bona fide* holder of the bond.[5] Where the coupon bonds of a corporation are guaranteed by the State, any agreement entered into and indorsed on

[1] The People *v.* Mead, 24 N. Y. 124; Conn. Mut. Life Ins. Co. *v.* Cleveland, etc., R. R. Co., 41 Barb. 22; Augusta *v.* Augusta Bank, 56 Me. 176; San Antonio *v.* Meharty, 96 U. S. 315; Draper *v.* Springport, 104 U. S. 501.

[2] Parson *v.* Jackson, 99 U. S. 434. Also Jackson *v.* Vicksburg, etc., R. R. M. Co., 2 Woods C. C. 141.

[3] Gelpcke *v.* Dubuque, 1 Wall. 178; Thompson *v.* Lee County, 3 Wall 338; City of Kenosha *v.* Lamson, 8 Wall. 478; City of Lexington *v.* Butler, 14 Wall. 289; Lynde *v.* County of Winnebago, 16 Wall. 13; Conn. Mut. Ins. Co. *v.* Cleveland, etc., R. R. Co., 41 Barb. 9.

[4] Prettyman *v.* Tazewell County, 19 Ill. 406; People ex rel., etc., *v.* Tazewell County, 22 Ill. 151; Johnson *v.* County of Stark, 24 Ill. 91; Pekin *v.* Reynolds, 31 Ill. 530.

[5] City of Elizabeth *v.* Force, 29 N. J. Eq. 591, overruling 28 N. J. Eq. 587; Commonwealth *v.* Emigration Sav. Bank, 98 Mass. 12; Berdsell *v.* Russell, 29 N. Y. 220.

the bonds by the corporation, subsequent to their execution by the State, will bind only the corporation, and not the State, as guarantor.[1]

§ 476. **Presentment of coupons for payment.** — The coupons need not be presented for payment on the day of maturity, in order to hold the principal obligors liable, even when they are in the form of a draft or order on a bank.[2] But it would be necessary to present at maturity, in order to hold an indorser, if there be one;[3] and within a reasonable time after maturity, in order to hold a guarantor.[4] Nor is a prior presentment for payment necessary to the recovery of interest on coupons,[5] even when the coupons are made payable at a particular bank in another State.[6] But if the railroad or other corporation, which issued the bond and coupon, can show that it was ready at the stipulated place, or at its treasury, to pay the coupon on the day of maturity, no interest could then be recovered on the coupon.[7]

[1] Wallace *v.* Loomis, 97 U. S. 147.

[2] Mayor, etc., *v.* Potomac Ins. Co., 58 Tenn. 296; County of Greene *v.* Daniel and County of Pickens *v.* Daniel, 102 U. S. 187; Arents *v.* Commonwealth, 18 Gratt. 773; Langston *v.* S. C. R. R. Co., 2 S. C. 248; Jeffersonville *v.* Patterson, 26 Ind. 16.

[3] Bonner *v.* New Orleans, 2 Woods C. C. 135.

[4] Arents *v.* Commonwealth, 18 Gratt. 773.

[5] Walnut *v.* Wade, 103 U. S. 683; Ohio *v.* Frank, 103 U. S. 697; North Pa. R. R. Co. *v.* Adams, 54 Pa. St. 97; Mills *v.* Jefferson, 20 Wis. 50; Jeffersonville *v.* Pattersonville, 26 Ind. 16; Langston *v.* S. C. R. R. Co., 2 S. C. 248; San Antonio *v.* Lane, 32 Texas, 405; Virginia *v.* Chesapeake, etc., Canal Co., 32 Md. 501. See *contra* Whittaker *v.* Hartford, etc., R. R. Co., 8 R. I. 47; Pekin *v.* Reynolds, 31 Ill. 531; Johnson *v.* Stark County, 24 Ill. 75; Chicago *v.* People, 56 Ill. 327.

[6] Gelpcke *v.* Dubuque, 1 Wall. 175; Thomson *v.* Lee County, 3 Wall. 327. See also Aurora City *v.* Welt, 7 Wall. 82; Clark *v.* Iowa City, 20 Wall. 583; Genoa *v.* Woodruff, 92 U. S. 502.

[7] Walnut *v.* Wade, 103 U. S. 697; North Penn. R. R. Co. *v.* Adams, 54 Pa. St. 97.

§ 477. **Interest and exchange on bond and coupon.** — During the time that the bond is running, the interest collectible on the bond is represented by the coupon, and it can only be recovered by a presentment of the coupon.[1] After maturity of the bond, interest may be recovered by the holder of the bond for any delay in payment.

Since coupons are separate and independent securities, they bear interest themselves after their maturity; and the interest is recoverable by the holder of the coupon.[2]

And so, also, may exchange be recovered on coupons, whenever it could be recovered on bills and notes.[3]

§ 478. **Actions on bonds and coupons.** — The holder of both the bond and the coupons may sue on them in his own name;[4] and although it has been denied,[5] it is now

[1] City of Kenosha *v.* Lamson, 9 Wall. 482; Williamson *v.* New Albany, etc., R. R. Co., 9 Am. Ry. Times, 37, U. S. C. C.

[2] Aurora City *v.* West, 7 Wall. 105; Gelpcke *v.* Dubuque, 1 Wall. 206; Thomson *v.* Lee Co., 3 Wall. 332; Genoa *v.* Woodruff, 92 U. S. 502; Amy *v.* Dubuque, 98 U. S. 471; Koshkonong *v.* Burton, 104 U. S. 668; Mills *v.* Jefferson, 20 Wis. 50; San Antonio *v.* Lane, 32 Texas, 405; Nat. Exch. Bank *v.* Hartford, etc., R. R. Co., 8 R. I. 375; Beaver County *v.* Armstrong, 6 Wright, 63; North Penn. R. R. Co. *v.* Adams, 54 Pa. St. 94; Welsh *v.* St. Paul, etc., R. R. Co., 25 Minn. 320; Arents *v.* Commonwealth, 18 Gratt. 776; Gibert *v.* W. C. V. M., etc., R. R. Co., 33 Gratt. 599; Hollingsworth *v.* City of Detroit, 3 McLean, 472; Virginia *v.* Chesapeake, etc., Canal Co., 32 Md. 501; Langston *v.* S. C. R. R., 2 S. C. 248; Conn. Mut. Ins. Co. *v.* Cleveland, etc., R. R. Co., 41 Barb. 9.

[3] Gelpcke, *v.* Dubuque, 1 Wall. 20 Koshkonong *v.* Burton, 104 U. S. 668; Jeffersonville *v.* Paterson, 26 Ind. 16. In Gelpcke *v.* Dubuque, "municipal bonds with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them with interest and exchange at the place where by their terms they were made payable."

[4] Society for Savings *v.* City of New London, 29 Conn. 175; Carr *v.* Le Fevre, 27 Pa. St. 413; Johnson *v.* County of Stark, 22 Ill. 75.

[5] In Jackson *v.* Y. & C. R. R. Co., 2 Am. Law Reg. (N. S.) 585; Crosby *v.* New London, etc., R. R. Co., 26 Conn. 121, it was held that no separate action can be maintained on the coupon, unless the coupon contained a distinct promise to pay.

generally held to be the law that the holder of the coupon may in any case maintain a separate action on the coupon, and need not join with the holder of the bond; nor need the bond be produced in evidence.[1] The recovery on the bonds is so independent of the recovery on the coupons, that a judgment that one is a *bona fide* owner of certain coupons does not prove that he is also a *bona fide* owner of the bonds, from which the coupons were detached.[2]

The same provision of the statute of limitation applies to both bond and coupon; and in order that action may be brought on the coupon, it must be begun within the statutory period after its maturity, although the bond is not yet due.[3]

§ 479. **When consideration paid to corporation for invalid bond may be recovered.** — When the transaction, in which the bonds were issued, is not a *malum in se*, and the parties paying for the bonds are not participants in the violation of the law, the consideration paid to the corporation for the illegal bonds can be recovered back, with in-

[1] Comrs. of Knox Co. *v.* Aspinwall, 21 How. 54; Beaver County *v.* Armstrong, 44 Pa. St. 63; Kennard *v.* Cass Co., U. S. C. C., 3 Dillon C. C. 147; Town of Cicero *v.* Clifford, 53 Ind. 191; First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87; Thompson *v.* Lee County, 3 Wall. 327; Walnut *v.* Wade, 103 U. S. 695; Nat. Exch. Bank *v.* Hartford, etc., R. R. Co., 8 R. I. 375; Mayor, etc., *v.* Potomac Ins. Co., 58 Tenn. 296; Welch *v.* First Div. St. Paul, etc., R. R. Co., 25 Minn. 320. The coupons may be sued on, notwithstanding the bonds have been already paid and surrendered. Nat. Exch. Bank *v.* Hartford, etc., R. R. Co., *supra;* and although the bonds need not be produced in evidence, the coupons in suit should ordinarily be identified in the declaration by a statement of the number of the bond, date, sum and time of payment. Kennard *v.* Cass Co., *supra.*

[2] Stewart *v.* Lansing, 104 U. S. 505.

[3] City of Kenosha *v.* Lamson, 9 Wall. 483, 484; City of Lexington *v.* Butler, 15 Wall. 296; Clark *v.* Iowa City, 20 Wall. 586; Amy *v.* Dubuque, 98 U. S. 471; Koshkonong *v.* Burton, 104 U. S. 668.

terest from the time that the corporation denied its liability and refused to pay.[1]

§ 480. **When municipal corporation has power to issue negotiable coupon bonds.** — Although it has been questioned, it is undoubtedly now the established rule of law in the United States that a municipal corporation has not the power to borrow money or to execute and issue negotiable coupon bonds, unless that power is granted to it by the legislature, expressly or by necessary implication, as incidental to the effectual attainment of the ends contemplated in, and sanctioned by, the grant of express powers.[2]

But while this is true, the weight of authority recognizes the municipal corporation as having by implication the power to contract debts and borrow money to pay them, whenever it is necessary to carry out some express power,[3] unless the statutory authority directly or inferentially contemplates the raising of the necessary funds by taxation.[4] So, also, whenever a corporation has the power to borrow money, it has by implication the power to evidence the debt thus contracted by the issue of negotiable coupon

[1] Louisiana *v.* Wood, 102 U. S. 294, affirming *s. c.* in 5 Dillon C. C. 122. See also Thomas *v.* City of Richmond, 12 Wall. 354; Draper *v.* Springport, 104 U. S. 501; Oneida Bank *v.* Ontario Bank, 21 N. Y. 496; Jackson County *v.* Hall, 55 Ill. 444.

[2] Thompson *v.* Lee County, 3 Wall. 327; Dartmouth College *v.* Woodward, 4 Wheat. 636; Miller *v.* Ray, 19 Wall. 468; Pendleton County *v.* Amy, 13 Wall. 297; Kennicott *v.* Supervisors, 16 Wall. 452; St. Joseph Township *v.* Rogers, 16 Wall. 644; Town of Coloma *v.* Eaves, 92 U. S. 484; Town of South Ottawa *v.* Perkins, 94 U. S. 262; Starin *v.* Town of Genoa, 23 N. Y. 447; Clark *v.* Des Moines, 19 Iowa, 200; Dively *v.* Cedar Falls, 21 Iowa, 566.

[3] Lynde *v.* County, 16 Wall. 12; City of Galena *v.* Corwith, 48 Ill. 424; Bank *v.* Chillicothe, 7 Ohio, pt. II., 31; State *v.* Madison, 7 Wis. 688; Mills *v.* Gleason, 11 Wis. 47. See Wells *v.* Supervisors, 102 U. S. 625.

[4] Wells *v.* Supervisors, 102 U. S. 625. In such a case, the express power to contract a debt would not include by implication the power to borrow money to pay for it. Wilson *v.* City of Shreveport, 29 La. 678; Ketchum *v.* City of Buffalo, 14 N. Y. 256.

bonds for the amount.[1] But in New York, it is held that the power to contract a debt did not involve by implication the power to execute and issue negotiable bonds for the same.[2] The grants of power to municipal corporations and to their officers are, however, strictly construed;[3] and where the statute points out a particular method or course to be pursued in the issue of the bonds, the bonds are invalid, if any other course is adopted.[4] Thus, all the conditions precedent set down in the statute must be performed, before there can be a lawful issue of the bonds.[5]

[1] Seybert *v.* City of Pittsburgh, 1 Wall. 372; Meyer *v.* Muscatine, 1 Wall. 387; City of Williamsport *v.* Commonwealth, 84 Pa. St. 500; Commonwealth ex rel. Reinbath *v.* Pittsburgh, 41 Pa. St. 278; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Middleton *v.* Alleghany County, 37 Pa. St. 241; Railroad Co. *v.* Evansville, 15 Ind. 395; De Voss *v.* City of Richmond, 18 Gratt. 338; Galena *v.* Corwith, 48 Ill. 423; Rogers *v.* Burlington, 3 Wall. 654.

[2] Starin *v.* Town of Genoa, 23 N. Y. 454, Lott, J.: "It was evidently the intention of the act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or the position that the credit merely of any town should be given, through and by which money might be raised. A town might be willing to incur a debt to a limited sum with the knowledge that the whole amount for which it was incurred was actually to be appropriated to the construction of a railroad that might be deemed conducive to its interests, but would absolutely refuse to issue their bonds, for the purpose of sale, from which much less than the amount for which they were given might be realized. If it had been intended to authorize bonds to be given for stock, there is no reason why that intention should not have been declared, as was done in the law in relation to the village of Rome, above referred to." See also Gould *v.* Town of Sterling, 23 N. Y. 458, and Cooley Const. Lim. 218.

[3] Veeder *v.* Lima, 19 Wis. 291; Treadwell *v.* Commissioners, etc., 11 Ohio St. 199.

[4] County of Hardin *v.* McFarlan, 82 Ill. 138; Starin *v.* Town of Genoa, 23 N. Y. 439; Gould *v.* Town of Sterling, 23 N. Y. 456; People *v.* Mead, 24 N. Y. 114; Scipio *v.* Wright, 101 U. S. 665.

[5] Steines *v.* Franklin County, 48 Mo. 167; Flagg *v.* Palmyra, 33 Mo. 40; Marshall Co. *v.* Cook, 38 Ill. 44; Town of Eagle *v.* Kohn, 84 Ill. 292; Wallace *v.* Mayor of San Jose, 29 Cal. 188; Portland, etc., R. R. Co. *v.*

But only substantial compliance with the statute is required. Immaterial omissions or irregularities will not affect the validity of the bonds.[1] It may also be added, that, when the general authority to issue the bonds is established, the law presumes, until the contrary is shown, that all the conditions have been complied with; and the plaintiff need not aver a performance of them.[2]

§ 481. **For what objects may municipal corporations be empowered to issue bonds.**— There is a limit even to the power of the legislature to authorize the issue of bonds by a municipal corporation. In order that the bonds may be lawfully issued, they must be issued to attain some public purpose or benefit. If the bonds are issued to secure some private end, the bond is void, notwithstanding the express grant of authority by the legislature.[3] And the tax-payers of the municipality may secure by an injunction the prevention of such a disposition of the public credit.[4]

Of course, every purpose is public, which involves the construction of public buildings, works and grounds, such

Hartford, 58 Me. 23; Barnes *v.* Town of Lacon, 84 Ill. 461; State of Arkansas *v.* Little Rock, etc., R. R. Co., 31 Ark. 701.

[1] People *v.* Holden, 82 Ill. 93; Mercer Co. *v.* Hubbard, 45 Ill 142; Town of East Lincoln *v.* Davenport, 94 U. S. 801; Steines *v.* Franklin Co., 48 Mo. 179; Smead *v.* Trustee's Union Township, 8 Ohio St. 394.

[2] Lincoln *v.* Iron Co., 103 U. S. 412; Commissioners of Knox Co. *v.* Aspinwall, 21 How. 544; Meyer *v.* Muscatine, 1 Wall. 393; Gelpcke *v.* Dubuque, 1 Wall. 203; Supervisors *v.* Schenck, 5 Wall. 784; Mayor *v.* Lord, 9 Wall. 414; City of Lexington *v.* Butler, 14 Wall. 296; County of Henry *v.* Nicolay, 95 U. S. 626; San Antonio *v.* Lane, 32 Tex. 414.

[3] Davidson *v.* Ramsey County, 18 Minn. 482; Loan Association *v.* Topeka, 20 Wall. 655; Township of Burlington *v.* Beasley, 94 U. S. 314; Allen *v.* Inhabitants of Jay, 60 Me. 124; Lowell *v.* Boston, 111 Mass. 454; Commercial Nat. Bank *v.* Iola, 9 Dill. C. C. 353; 9 Kan. 700; State ex rel Griffith *v.* Osawkee Township, 14 Kan. 418; Weismer *v.* Village of Douglass, 11 N. Y. S. C. (4 Hun) 211.

[4] Crampton *v.* Zabriskie, 101 U. S 601.

as parks and cemeteries.[1] And so, also, is it a public purpose to promote the construction of railroads, turnpikes, canals and other highways, by the donation of money or by taking the stock of the private corporation, which undertakes the construction.[2]

[1] County Commissioners *v.* Chandler, 96 U. S. 205 (a bridge); Township of Burlington *v.* Beasley, 94 U. S. 314; City of Aurora *v.* West, 9 Ind. 74 (gas-works); Rome *v.* Cabat, 28 Ga. 50 (water-works); Stein *v.* Mobile, 24 Ala. 591; Hale *v.* Houghton, 8 Mich. 458; Greeley *v.* People, 60 Ill. 19 (town-hall); Rogers *v.* Burlington, 3 Wall. 362 (construction and grading of streets); Sturtevant *v.* City of Alton, 3 McLean, 393; State *v.* Madison, 7 Wis. 688 (markets); Mills *v.* Gleason, 11 Wis. 470; Robinson *v.* St. Louis, 28 Mo. 488 (fire engines).

[2] Knox County *v.* Aspinwall, 21 How. 539; Gelpcke *v.* Dubuque, 1 Wall. 175; Seybert *v.* Pittsburg, 1 Wall. 272; Meyer *v.* City of Muscatine, 1 Wall. 390; Sheboygan County *v.* Parker, 3 Wall. 96; Havemeyer *v.* Iowa County, 3 Wall. 294; Thomson *v.* Lee County, 3 Wall. 330; Rogers *v.* Burlington, 3 Wall. 362; Mitchell *v.* Burlington, 4 Wall. 274; Campbell *v.* Kenosha, 5 Wall. 196, 200; Supervisors *v.* Schenck, 5 Wall. 776; The City of Kenosha *v.* Lamson, 9 Wall. 479; Bath County *v.* Amy, 13 Wall. 244; Pendleton Co. *v.* Amy, 13 Wall. 298; Kenniscott *v.* Supervisors, 16 Wall. 452; St. Joseph Township *v.* Rogers, 16 Wall. 644; Olcott *v.* Supervisors, 16 Wall. 678; Township of Pine Grove *v.* Talcott, 19 Wall. 666; City of Bridgetown *v.* Housatonic R. R. Co., 15 Conn. 475; Talbot *v.* Dent, 9 B. Mon. 526; Slack *v.* Maysville R. R. Co., 13 B. Mon. 1; Davis *v.* Ramsey Co., 18 Minn. 482; Strickland *v.* Railroad Co., 27 Miss. 209; Leavenworth County *v.* Miller, 7 Kan. 479; Gibbons *v.* R. R. Co., 36 Ala. 410; Augusta Bank *v.* Augusta, 49 Me. 507; Starin *v.* Genoa, 23 N. Y. 439; Gould *v.* Sterling, 23 N. Y. 439; San Antonio *v.* Lane, 32 Tex. 405; Goddin *v.* Crump, 8 Leigh, 120; Nichol *v.* Mayor of Nashville, 9 Humph. 252; Commonwealth *v.* McWilliams, 11 Pa. St. 61; Sharples *v.* Mayor, 21 Pa. St. 147; Mosers *v.* City of Reading, 21 Pa. St. 188; Hallenbeck *v.* Hahn, 2 Neb. 377; City *v.* Alexander, 23 Mo. 483; Aurora *v.* West, 9 Ind. 74; Prettyman *v.* Supervisors, 19 Ill. 406; Butler *v.* Dunham, 27 Ill. 474; Stein *v.* Mobile, 24 Ala. 591; Benson *v.* Mayor, 24 Barb. 248; Duanesburg *v.* Jenkins, 40 Barb. 579; Winn *v.* City of Macon, 21 Ga. 275; County of Randolph *v.* Post, 93 U. S. 502. It is even permissible for a municipal corporation to donate its bonds to a railroad company whose construction promises to prove beneficial to the municipality, whether the proposed railroad was within or without the State. Railroad Company *v.* County of Otoe, 16 Wall. 667; Town of Queensbury *v.* Culver, 19 Wall. 84; Quincy, etc., R. R. Co. *v.* Morris, 84 Ill. 410.

But while the weight of authority recognizes the right of the legislature to grant this power to municipal corporations, there are some authorities opposing this view of the majority, holding that the legislature cannot authorize a municipal corporation to contract debts in aid of the construction of railroads, and other highways of commerce.[1] The extravagance and recklessness, which have been displayed very generally by municipalities in the exercise of this power, have induced the imposition of constitutional prohibitions on the grant of the power. And whenever there is such a provision, the exercise of the power is of course out of the question, at least as to any future grant of the power. But if the provisions of the constitution can, by any reasonable construction, be made to apply only to future grants of power, the enforcement of them will be held not to abrogate any previous grant of power, which has not yet been exercised. Where that is the proper construction, bonds issued subsequently in pursuance of the pre-existing grant of authority will be valid, notwithstanding the constitutional prohibition.[2]

On the other hand, where the purpose does not have any distinct public benefit in view, however laudable the purpose may be, the issue of bonds will be illegal. It is no public purpose to furnish aid to private individuals in case of any

[1] People *v.* Township Board of Salem, 20 Mich. 452; Thomas *v.* Port Huron, 27 Mich. 320; State *v.* Wapello, 13 Iowa, 388 (overruling Dubuque County *v.* R. R. Co., 4 G. Greene, 1); Hanson *v.* Vernon, 27 Iowa, 28.

[2] County of Scotland *v.* Thomas, 94 U. S. 682; County of Callaway *v.* Foster, 93 U. S. 567; County of Henry *v.* Nicolay, 95 U. S. 619; County of Schuyler *v.* Thomas, 98 U. S. 173; County of Cass *v.* Gillette, 100 U. S. 585; Cass *v.* Dillon, 2 Ohio St. 398; Snead *v.* Trustees of Union Township, 8 Ohio St. 394; Commissioners of Knox Co. *v.* Nichols, 14 Ohio St. 280; Smith *v.* County of Clark, 54 Mo. 58; The State *v.* Greene Co., 54 Mo. 540; State *v.* Sullivan Co., 51 Mo. 552; State *v.* Town of Clark, 23 Minn. 423; Moultrie Co. *v.* Fairfield, 105 U. S. 370.

general disaster, coming from any source whatever.[1] Nor is it a public purpose to furnish aid in the establishment of any private enterprise, where there is no direct and distinct benefit to the public.[2]

§ 482. **What defenses may be set up against bona fide holders of municipal bonds.** — The general principles, set forth in a previous chapter [3] on the rights of *bona fide* holders, apply to the *bona fide* holders of municipal bonds; and it will be only necessary here to refer to some particular applications of those general principles.

In the first place, if the issue of the bonds by the municipal corporation is without authority, *ultra vires*, the bonds will be void even as to *bona fide* holders who take them without actual notice.[4] For, since the limitations upon municipal powers are matters of public law and of public record, the purchaser, however ignorant of their existence, may be and is properly charged with constructive notice.[5]

[1] Lowell *v.* Boston, 111 Mass. 454 (aid to rebuild houses destroyed by fire); State ex rel. Griffith *v.* Osawkee Township, 14 Kan. 418 (to provide food and seed to destitute citizens).

[2] Loan Association *v.* Topeka, 20 Wall. 655 (to equip and furnish manufacturing establishments); Commercial Nat. Bank *v.* Iola, 2 Dill. C. C. 353; 9 Kan. 700; Allen *v.* Inhabitants of Jay, 60 Me. 124 (construction of grist mills); Township of Burlington *v.* Beasley, 94 U. S. 314; Weismer *v.* Village of Douglass, 11 N. Y. S. C. (4 Hun) 211 (to improve a water privilege for the manufacture of lumber).

[3] Chap. XIV. on Rights of *Bona Fide* Holders.

[4] Marsh *v.* Fulton Co., 10 Wall. 683; Town of South Ottawa *v.* Perkins, 94 U. S. 260; McClure *v.* Township of Oxford, 94 U. S. 432; Anthony *v.* Jasper Co., 101 U. S. 693; Wells *v.* Supervisors, 102 U. S. 625; Township of East Oakland *v.* Skinner, 94 U. S. 257; Town of Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562; Wilson *v.* City of Shreveport, 29 La. 673; Williamson *v.* City of Keokuk, 44 Iowa, 88.

[5] Clark *v.* Des Moines, 19 Iowa, 201; Gould *v.* Sterling, 23 N. Y. 463; Veeder *v.* Lima, 19 Wis. 298; Harter *v.* Kernschan, 103 U. S. 563; De Voss *v.* Richmond, 18 Gratt. 338; Duanesburg *v.* Jenkins, 40 Barb. 579; Backman *v.* Charleston, 42 N. H. 125; Bissell *v.* Kankakee, 64 Ill. 249;

This is especially true where there is a reference on the face of the bonds to the statute, under which they were issued.[1]

Where the power is given, subject to certain conditions, and the bonds import by recitals a compliance with the requirements of the law, the *bona fide* holder is not obliged to look further for proof of the performance or observance of the conditions, whether they are imposed by the law or are expressly created in the grant of the power.[2] But in order to bind the corporation, the recitals must purport to come from some officer or officers who are

Scott, J.: "The authority of a municipal corporation to issue bonds is derived from public laws, and the avenues to information in regard to the law and ordinances of such corporations being open to public inspection, the holder of such securities will be presumed to have examined them, and to have known whether the corporation had the requisite power to issue the bonds. He has no such opportunity in regard to private corporations. Their by-laws are not open to inspection by those who deal in securities issued by them, and hence the reason for the distinction that has been taken. The holder of the bonds involved in this action had every opportunity to know whether the city had any lawful right to issue them, for the reason that its authority, if any existed, was to be found in public statutes, and if they did not in fact examine, as it was their privilege to do before buying, they will be presumed to have done so, and to have known that they were issued without authority of law, and therefore void in the hands of any holder either with or without notice."

[1] McClure *v.* Township of Oxford, 94 U. S. 429; City of Aurora *v.* West, 22 Ind. 89; Silliman *v.* Fredericksburg, etc., R. R. Co., 27 Gratt 119; Fisk *v.* City of Kenosha, 26 Wis. 29; Louisiana St. Bank *v.* Orleans Nav. Co., 3 La. Ann. 295.

[2] Commissioners of Knox County *v.* Aspinwall, 21 How. 545; Pendleton County *v.* Amy, 13 Wall. 305; Moran *v.* Miami County, 2 Black, 722; Larned *v.* Burlington, 4 Wall. 276; Kenicott *v.* Supervisors, 16 Wall. 464; Menasha *v.* Hazard, 102 U. S. 81; Township of Rock Creek *v.* Strong, 96 U. S. 227; San Antonio *v.* Meharty, 96 U. S. 313; Pompton *v.* Cooper Union, 101 U. S. 204; Mercer Co. *v.* Hackett, 1 Wall. 93; St. Joseph Township *v.* Rogers, 16 Wall. 659; Bissell *v.* Jeffersonville, 24 How. 287; Grand Chute *v.* Winegar, 15 Wall. 377; Lynde *v.* County, 16 Wall. 6; County of Warren *v.* Marcy, 97 U. S. 96; Commissioners *v.* Bolles, 94 U. S. 104; Commissioners *v.* January, 94 U. S. 202.

charged by the law, expressly or inferentially, with the duty of ascertaining the fact that the conditions have been properly performed.[1] Where, however, a particular agent is authorized to act for the corporation upon the performance or happening of certain conditions, his assertion, that the requirements of the law have been complied with, will not be binding on the corporation, even as against *bona fide* holders.[2]

The failure of the agents to observe the required formalities of execution and issue of the bonds, or their fraud in negotiating them, cannot be set up as a defense against a *bona fide* holder.[3]

An illegal issue of bonds may also be ratified by the members of the municipal corporation. But in order that the ratification may have the effect of curing any illegality or defect of title, it must be made by one who is competent to contract; and it must refer to acts which the party ratifying is competent to perform.[4] Within these limits, an illegal issue of bonds by a municipal corporation may

[1] Town of Coloma, 92 U. S. 491; Town of Venice *v.* Murdock, 92 U. S. 496; Town of Genoa *v.* Woodruff, 92 U. S. 502; County of Moultrie *v.* Savings Bank, 92 U. S. 631; Marcy *v.* Township of Oswego, 92 U. S. 637; Commissioners *v.* Bolles, 94 U. S. 104; Bonham *v.* Needles, 103 U. S. 648; Lincoln *v.* Iron Co., 103 U. S. 413; St. Joseph Township *v.* Rogers, 16 Wall. 659; Lynde *v.* County, 16 Wall. 13; Walnut *v.* Wade, 103 U. S. 683; Buchanan *v.* Litchfield, 102 U. S. 291; Orleans *v.* Pratt, 99 U. S. 676; Commissioners *v.* January, 94 U. S. 202; Kenicott *v.* Supervisors, 16 Wall. 452; Bank of Rome *v.* Village of Rome, 19 N. Y. 20; Commissioners of Knox Co. *v.* Nichols, 14 Ohio St. 271; Pompton *v.* Cooper Union, 101 U. S. 204.

[2] Gould *v.* Town of Sterling, 23 N. Y. 463; Treadwell *v.* Commissioners, 11 Ohio St. 183; Wallace *v.* Jose, 29 Cal. 188; Clark *v.* Des Moines, 19 Iowa, 201; Veeder *v.* Lima, 19 Wis. 298; Starin *v.* Town of Genoa, 23 N. Y. 440.

[3] Kenicott *v.* Supervisors, 16 Wall. 465; Town of East Lincoln *v.* Davenport, 94 U. S. 801; People *v.* Mead, 24 N. Y. 114.

[4] Marsh *v.* Fulton County, 10 Wall. 683; Boom *v.* City of Utica, 2 Barb. 105.

be ratified in two different ways: The corporation will be estopped from asserting their illegality (1) by failing to prevent their issue by injunction, and receiving and keeping the proceeds of the sale of the bonds;[1] (2) by voting for, or submitting to, taxation to pay the principal and interest of the bonds.[2]

[1] Supervisors *v.* Schenck, 5 Wall. 581; County of Randolph *v.* Post, 93 U. S. 502; Pendleton County *v.* Amy, 13 Wall. 305; Rogers *v.* Burlington, 3 Wall. 667; State *v.* Van Horn, 7 Ohio St. 331; State *v.* Trustees of Union Township, 8 Ohio St. 403; Meyer *v.* Muscatine, 1 Wall. 392; Comrs. *v.* January, 94 U. S. 206; County of Ray *v.* Vansycle, 96 U. S. 687; Ferguson *v.* Landram, 5 Bush, 231; Barrett *v.* County Court, 44 Mo. 199.

[2] Supervisors *v.* Schenck, 5 Wall. 581; County of Ray *v.* Vansycle, 96 U. S. 687; Hannibal, etc., R. R. Co. *v.* Marion Co., 36 Mo. 295; State *v.* Van Horn, 7 Ohio St. 331; Shoemaker *v.* Goshen Township, 14 Ohio St. 587; Leavenworth, etc., R. R. Co. *v.* Comrs. Douglass Co., 18 Kan. 170; Keithsburg *v.* Frick, 34 Ill. 421; Mercer County *v.* Hubbard, 45 Ill. 142.

CHAPTER XXVI.

CERTIFICATES OF DEPOSIT.

SECTION 485. Origin and nature of certificates of deposit.
486. Transfer and negotiability of certificates of deposit.
487. Overdue certificates.
488. Necessity for demand — Statute of limitations.
489. Payment by transfer of certificate of deposit.

§ 485. **Origin and nature of certificates of deposit.** — A certificate of deposit is a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which he promises to pay to bearer, or to the order of the depositor or of some other person.[1] Whenever the bank or banker has the power to execute and issue promissory notes, the power to execute certificates of deposit is included, for they are in fact nothing more than promissory notes.[2] They are used, instead of drawing checks on the fund deposited, whenever the depositor desires a continuing security, drawing interest, and payable on demand or at some time in the future.[3]

The certificate of deposit is supposed to have originated with the goldsmiths of England, who, in the course of their banking business, were in the habit of giving to the depositors receipts for the money deposited, in the form of a promissory note.[4]

§ 486. **Transfer and negotiability of certificates of deposit.** — If the certificate of deposit is payable to bearer,

[1] 2 Daniel's Negot. Inst., § 1698.
[2] Morse on Bank. 53.
[3] 2 Daniel's Negot. Inst., § 1698.
[4] Nicholson *v.* Sedgwick, 1 Ld. Raym. 180; 3 Salk. 67.

it may be, and is usually, transferred by delivery merely. But if it is made payable to the order of some one, it must be indorsed by him, in order to pass the legal title ; and the liability of these indorsers is the same as the indorser of a bill of exchange or of a promissory note.[1]

Although there are authorities, which deny the negotiability of certificates of deposit,[2] the great majority of the cases hold that certificates of deposit have all the characteristics of negotiability which pertain to promissory notes in general.[3] But in order that the certificate may possess the characteristics of negotiability, it must contain all the requisites of negotiability which are required in the case of promissory notes. The absence of any one of the requisites will destroy the negotiable character of the certificate of deposit.[4] And the same is true of statutory as well as of common-law requisites. If a statute makes additional

[1] Pardee *v.* Fisher, 60 N. Y. 265; Vastine *v.* Wilding, 45 Mo. 89; Cate *v.* Patterson, 25 Mich. 191; Hazelton *v.* Union Bank, 32 Wis. 35; Ford *v.* Mitchell, 15 Wis. 304; Coye *v.* Palmer, 16 Cal. 158; Mills *v.* Barney, 22 Cal. 240.

[2] Patterson *v.* Poindexter, 6 Watts & S. 227; Chasnley *v.* Dallas, 8 Watts & S. 353. See Lebanon Bank *v.* Mangan, 28 Pa. St. 452; London Sav. Society *v.* Savings Bank, 36 Pa. St. 498.

[3] Miller *v.* Austen, 13 How. 218; Carey *v.* McDougald, 7 Ga. 84; Lynch *v.* Goldsmith, 64 Ga. 42; Bank of Orleans *v.* Merrill, 2 Hill, 295; Drake *v.* Markle, 21 Ind. 433; Lafayette Bank *v.* Ringel, 51 Ind. 393; Fells Point Sav. Inst. *v.* Weedon, 18 Md. 528; Cate *v.* Patterson, 25 Mich. 191; Blood *v.* Northrup, 1 Kan. 28; Frank *v.* Wessels, 64 N. Y. 155; Pardee *v.* Fish, 60 N. Y. 265; Howe *v.* Hartness, 11 Ohio St. 449; Bank of Peru *v.* Farnsworth, 18 Ill. 563; Laughlin *v.* Marshall, 19 Ill. 390; Kilgore *v.* Bulkley, 14 Conn. 362; Bean *v.* Briggs, 1 Clarke (Iowa), 488; Johnson *v.* Barney, 1 Iowa, 531; Welton *v.* Adams, 4 Cal. 37; Mills *v.* Barney, 22 Cal. 240; Brummagin *v.* Tallant, 29 Cal. 503; Poorman *v.* Mills, 35 Cal. 118; Fultz *v.* Walters, 2 Montana, 165; Bellows Falls Bank *v.* Rutland, 40 Vt. 377; Tripp *v.* Curtenius, 36 Mich. 494.

[4] Huse *v.* Hamblin, 29 Iowa, 501; Rindskoff *v.* Barrett, 11 Iowa, 172; Ford *v.* Mitchell, 15 Wis. 304; Lindsay *v.* McClelland, 18 Wis. 481; London S. C. *v.* Hagerstown S. Bank, 12 Casey, 498; Easton *v.* Hyde, 13 Minn. 90.

requisites for the negotiability of promissory notes, the statute will apply to certificates of deposit.[1] It has also been held that the certificate of deposit is not negotiable, if it does not contain an express promise to pay the money deposited.[2] In that case, the certificate of deposit is only a receipt for money, and not an independent obligation.

§ 487. **Overdue certificates.** — Like all other negotiable instruments, the certificate of deposit must be transferred before maturity, in order to enable the transferee to claim the superior rights of a *bona fide* holder.[3] If it is overdue, when it is transferred, the transferee takes it subject to equitable defenses.[4] But the certificate is not considered overdue, when it is payable on demand, until there has been a demand for payment and a refusal to pay.[5]

§ 488. **Necessity for a demand — Statute of limitations.** — It has been held that there is no need to make demand of payment on the certificate of deposit, even though the certificate is expressed to be payable "on return (presentment) of this certificate." Even in such cases, it is the duty of the bank to hunt up the holder of the certificate, and tender payment, in order to save accruing interest and costs.[6] But where the certificate was "payable to order of himself on presentation of this certificate properly indorsed," it was held that there was no right of action, until there had been a demand.[7]

[1] International Bank *v.* German Bank, 3 Mo. App. 367.

[2] Hotchkiss *v.* Mosher, 48 N. Y. 482.

[3] See chapter on Rights of *Bona Fide* Holders.

[4] Tripp *v.* Curtenius, 36 Mich. 494; Coye *v.* Palmer, 16 Cal. 158.

[5] Pardee *v.* Fish, 60 N. Y. 271, citing Merritt *v.* Todd, 23 N. Y. 28; Nat. Bank of Ft. Edward *v.* Washington Co. Nat. Bank, 12 N. Y. S. C. (5 Hun) 605. But see *contra* Tripp *v.* Curtenius, 36 Mich. 497.

[6] Cate *v.* Patterson, 25 Mich. 191; Bellows Falls Bank *v.* Rutland Co. Bank, 40 Vt. 377, affirming Smilie *v.* Stevens, 39 Vt. 315; Hunt *v.* Divine, 37 Ill. 137.

[7] Bellows Falls Bank *v.* Rutland Co. Bank, 40 Vt. 377.

It has also been held that the statute of limitations begins to run from the date of the certificate.[1] But the better opinion is, that the statute does not begin to run until there had been a demand of payment, the certificate of deposit being intended as a continuing security.[2]

§ 489. **Payment by transfer of certificate of deposit.**— If a certificate of deposit is transferred in payment of a debt, it is *prima facie* a conditional payment only.[3] But if the creditor does not make immediate demand of payment, and instead transfers it to another in settlement of some obligation of his own, the payment becomes absolute; and the original payee of the certificate is not responsible, if the bank should fail before demand of payment.[4]

[1] Tripp *v.* Curtenius, 36 Mich. 499; Brummagin *v.* Tallant, 29 Cal. 503.

[2] Munger *v.* Albany City Nat. Bank, 85 N. Y. 587; Pardee *v.* Fish, 60 N. Y. 265; Payne *v.* Gardiner, 29 N. Y. 146. See Howell *v.* Adams, 68 N. Y. 314; Boughton *v.* Flint, 74 N. Y. 476; Fells Point Sav. Inst. *v.* Weedon, 28 Md. 320; Bellows Falls Bank *v.* Rutland Co. Bank, 40 Vt. 377.

[3] Lindsey *v.* McClelland, 18 Wis. 481; Johnson *v.* Barney, 1 Clarke (Iowa), 531.

[4] Bower *v.* Hoffmann, 23 Md. 264.

CHAPTER XXVII.

BILLS OF LADING.

SECTION 491. Definition and nature of bills of lading.
492. Form and contents of the bill of lading.
493. Transfer of bills of lading—Their negotiability.
494. Effect of attaching bill of lading to draft on vendee for the purchase money.

§ 491. **Definition and nature of bills of lading.** — A bill of lading is very often called a negotiable instrument.[1] But, although it does possess some of the qualities of negotiability,[2] it is not strictly one independently of statute, and is more properly described as *quasi*-negotiable.[3]

The bill of lading may be defined to be a written acknowledgment by a common carrier of the receipt of certain goods described therein, and an agreement to transport them to their place of destination, to be there delivered in good order to the consignee or his assigns. It has, therefore, a double character, it being both a receipt and contract for the carriage of the goods.[4] As a receipt, it has become, under the influence of commercial custom, a symbol of property, and passes title to the goods by delivery in

[1] Lickbarrow *v.* Mason, 2 T. R. 63; Berkling *v.* Watling, 7 Ad. & E. 22; Bell *v.* Moss, 5 Whart. 189.

[2] See *post*, §

[3] Gurney *v.* Behrend, 3 E. & B. 622; 22 L. J. Q. B. 265; Blanchard *v.* Page, 8 Gray, 297; Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145; National Bank *v.* Merchants' Nat. Bank, 91 U. S. 98; Barnard *v.* Campbell, 55 N. Y. 462.

[4] Redfield on Carriers, § 247; Knox *v.* The Nivella, Crabbe, 534; 1 Smith Lead. Cas. 879 *et seq.;* Haille *v.* Smith, 1 Bos. & Pul. 564; Howard *v.* Shepherd, 19 L. J. C. B. 248; Sanders *v.* Vanzeller, 12 L. J. Exch. 497.

the same manner as if the goods were themselves delivered.[1] But so distinct and separate are the two characters of the bill of lading according to the common law, that the assignee of the consignee could sue the common carrier for refusing to deliver the goods, called for by the bill of lading; but he could not recover damages of the carrier for refusing to transport them, the bill of lading, as an agreement for the carriage of the goods, being according to the common law non-assignable.[2]

The bill of lading, as a symbol of property is exhausted and becomes extinguished as soon as the goods have been delivered by the common carrier to the proper party. Its symbolical character is taken away by the delivery of the goods; and thereafter the owner's title to the goods does not rest upon the bill of lading, but upon the possession of the goods.[3]

§ 492. **Form and contents of the bill of lading.** — The bill of lading is usually issued in sets of three; one being retained by the common carrier, a second by the consignor, and a third to be sent to the consignee. In case of any variance between them in regard to terms, the contract is to be interpreted according to the terms of the copies delivered to the consignor. The copy kept by the common carrier cannot control the terms of the contract, since

[1] Gardner *v.* Howland, 2 Pick. 599; Empire Trans. Co. *v.* Steele, 70 Pa. St. 190; Indiana, etc., Bank *v.* Colgate, 4 Daly, 41; Newhall *v.* Central Pac. R. R. Co., 51 Cal. 345; Newsom *v.* Thornton, 6 East, 41; Mears *v.* Waples, 3 Houst. 582; Mower *v.* Peabody, 3 Kern. 121; Mechanics', etc., Bank *v.* Farmers', etc., Bank, 60 N. Y. 47.

[2] Haille *v.* Smith, 1 Bos. & Pul. 564; Thompson *v.* Downing, 14 L. J. Exch. 320; Howard *v.* Shepherd, 19 L. J. C. P. 248; Sanders *v.* Vanzeller, 12 L. J. Exch. 497.

[3] Hatfield *v.* Phillips, 9 M. & W. 467; Mottram *v.* Heyer, 5 Denio, 632. See Meyerstein *v.* Barber, L. R. 2 C. P. 661; 36 L. J. C. P. 361; First Nat. Bank *v.* Kelly, 57 N. Y. 34; Heiskell *v.* Farmers', etc., Bank, 89 Pa. St. 155.

it is but a mere memorandum in the hands of the carrier.[1] But the number of copies is immaterial. There may be four copies;[2] and yet there need not be more than one.[3]

Where there are three or more copies of the bill of lading, all the copies together constitute but one contract and but one obligation, so far as the common carrier is concerned. And if the copies are transferred to different parties, there can be but one claim for goods against the carrier. In such a case, where the equities are equal, the carrier must deliver to the one who first gets possession of the copy bill of lading.[4]

The bill of lading should contain a description of the quantity, and condition of the goods received, the marks on the same, the names of consignor and consignee, the places of shipment and discharge, and the price of the freight. If any limitations upon the liability of the common carrier have been agreed upon between the parties, they should also be expressed in the bill of lading. The shipper and carrier are both bound by the expressed terms of the bill of lading, which is signed; and its terms cannot be varied by parol evidence of agreements, which are not incorporated in the bill of lading.[5]

Where the bill of lading acknowledges the receipt of goods "in good order and well conditioned," it has reference only to the external condition, and is not a guaranty of good condition internally.[6]

The bill usually provides for the delivery of the goods to

[1] The Thames, 14 Wall. 98.

[2] Lickbarrow *v.* Mason, 2 T. R. 63.

[3] Dows *v.* Perrin, 16 N. Y. 325.

[4] Lamb *v.* Durant, 12 Mass. 54; Stevens *v.* Boston, etc., R. R. Co., 8 Gray, 262; 1 Smith Lead. Cas. 891.

[5] Gage *v.* Morse, 12 Allen, 410; Germania Fire Ins. Co. *v.* Memphis, etc., R. R. Co., 72 N. Y. 90; Belger *v.* Dinsmore, 51 N. Y. 166.

[6] Richards *v.* Doe, 100 Mass. 524; The Olbers, 3 Ben. 148; Hastings *v.* Pepper, 11 Pick. 43; The Oriflamme, 1 Saw. 176.

a named consignee, the consignee being either the consignor or some one else. The effect is the same, when the consignor has indorsed the bill to the person for whom the goods were intended, as if the bill had been originally made out in the name of this latter person.[1] And where the place for the name of the consignee is left blank, it may be subsequently filled up with the name of any one who lawfully gets possession of the bill of lading.[2]

§ 493. **Transfer of bill of lading — Its negotiability.** The bill of lading is transferable usually by indorsement, and strictly only by the consignee.[3] But where the consignor owns the goods and ships them on his own account, the consignee is, in fact, then, only his agent, and he can, by his own assignment of the bill of lading, give a title to the goods, which will prevail against every one but a *bona fide* transferee of the consignee.[4]

Delivery of the bill is as essential, to pass title to the goods, as the indorsement.[5] And where the goods are made by the bill deliverable to bearer, or where the bill of lading has been indorsed in blank, the delivery of the bill, without any indorsement or other writing, is all that is necessary to pass the title to the goods.

Not only may the indorsement of the bill of lading be made in blank, but it may also be made conditional or restrictive, and the indorsee takes it under those circumstances subject to the named conditions or restrictions.[6]

As has been stated in a previous paragraph the bill of lading is at common law only *quasi*-negotiable. Unlike the bill of exchange, the transferrer of a bill of lading

[1] Walley *v.* Montgomery, 3 East, 585.
[2] 2 Daniel's Negot. Inst., § 1736; Smith Mercantile Law, 377.
[3] The Sally Magee, 3 Wall. 457.
[4] Conrad *v.* Atlantic Ins. Co., 1 Pet. 445.
[5] Allen *v.* Williams, 12 Pick. 297; Buffington *v.* Curtis, 15 Mass. 528.
[6] Barrow *v.* Coles, 3 Camp. 92; Walley *v.* Montgomery, 3 East, 585.

does not give any better title to the goods to his transferee than what he has himself, where he either found or stole the bill, or bought it from one who had found or stolen it; and this is the case even where the bill of lading was indorsed in blank, and transferred by delivery to an innocent purchaser.[1] But where the bill of lading has been actually transferred by the real owner, but it was procured from him through the fraud of the transferee, and the transferee subsequently sold it to an innocent purchaser, the *bona fide* purchaser obtains a good title to the same, and the defense of fraud cannot be set up against him.[2]

The *bona fide* transferee will, however, in taking the bill of lading, defeat the vendor's right of *stoppage in transitu*. As long as the consignee retains the bill, the vendor's right of *stoppage in transitu* still exists; but as soon as the bill of lading has been transferred to a *bona fide* holder for value, this right is at an end.[3] But the right is not destroyed or taken away by an assignment of the consignee's title to the goods in any other way than by an indorsement and transfer of the bill of lading. In such a case, the assignee will take the title of the assignor to the goods, subject to the vendor's right of *stoppage in transitu*.[4]

It has also been held that the *bona fide* transferee acquires superior rights against the common carrier, in that the carrier cannot dispute the correctness of the ac-

[1] Gurney *v.* Behrend, 2 El. & B. 622; 23 L. J. Q. B. 265; Dows *v.* Perrin, 16 N. Y. 333; Moore *v.* Robinson, 62 Ala. 537; Barnard *v.* Campbell, 55 N. Y. 462; Brower *v.* Peabody, 3 Kern. 126; Shaw *v.* Railroad Co., 101 U. S. 557; Emery *v.* Irving Nat. Bank, 25 Ohio St. 255. See Voss *v.* Robertson, 46 Ala. 483.

[2] Pease *v.* Gloahec, 1 Privy C. App. 219; Dows *v.* Greene, 24 N. Y. 644.

[3] Lickbarrow *v.* Mason, 1 Smith Lead. Cas. 895, 896; Dows *v.* Greene, 24 N. Y. 641; Becker *v.* Hallgarten, 86 N. Y. 167; Newhall *v.* Cent. P. R. R. Co., 51 Cal. 345; Gurney *v.* Behrend, 2 El. & B. 622; Emery *v.* Irving Nat. Bank, 25 Ohio St. 360.

[4] Holmes *v.* Crane, 2 Pick. 606; Craven *v.* Ryder, 6 Taunt. 433.

knowledgments contained in the bill of lading even though the goods, which he acknowledged in the bill to have received, had never been delivered to him.[1] But the authorities are divided on this subject, and we find the weight of authority in favor of the proposition, that the carrier is not bound on the bill of lading issued by a clerk for goods, which had never been received by the carrier, since the clerk was not authorized to execute and issue the bill of lading except after the goods had been received. The common carrier, according to the following authorities, can set up the defense that the goods had never been received by it, even against a *bona fide* transferee of the bill of lading.[2] But if the goods are received by the carrier, the bill of lading will be conclusive of any other acknowledgment which the bill might contain.[3] And where the bill is issued with a guaranty of the quantity, no question can be raised as to that matter, since the statements in the bill are conclusive.[4]

[1] Armour *v.* Mich. Cent. R. R. Co., 65 N. Y. 111; Sioux City & P. R. R. Co. *v.* First Nat. Bank, 10 Neb. 556; Savings Bank *v.* Atchison, etc., R. R. Co., 20 Kan. 519. As between the original parties, and except as to the *bona fide* transferee, the bill of lading is only *prima facie* evidence of the truth of its acknowledgments. The Lady Franklin, 8 Wall. 325; The Delaware, 14 Wall. 579; Sears *v.* Wingate, 3 Allen, 103; Grace *v.* Adams, 100 Mass. 505; Dickenson *v.* Seelye, 12 Barb. 102; Meyer *v.* Peck, 28 N. Y. 590: Abbe *v.* Eaton, 51 N. Y. 410; Bissell *v.* Campbell, 54 N. Y. 356; Bates *v.* Todd, 1 Mood. & R. 106; Cox *v.* Peterson, 30 Ala. 608.

[2] The Schooner Freeman *v.* Buckingham, 18 How. 182; Pollard *v.* Vinton, 105 U. S. (1882) 7; Grant *v.* Norway, 20 L. J. C. P. 93; 10 C. B. 665; Hubbersty *v.* Ward, 18 Eng. L. & Eq. 551; McLean *v.* Flemming, L. R. 2 S. App. 128, Coleman *v.* Riches, 29 Eng. L. & Eq. 523; Hall *v.* Mayo, 7 Allen, 456; Sears *v.* Wingate, 3 Allen, 103; Balt. & O. R. R. Co. *v.* Wilkens, 44 Md. 11; Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419; Union, etc., R. R. Co. *v.* Yeager, 34 Ind. 1; Louisiana Bank *v.* Laveille, 52 Mo. 380; Fellows *v.* Steamer Powell, 16 La. Ann. 316; Hunt *v.* Miss. C. R. R. Co., 29 La. Ann. 449; Dean *v.* King, 22 Ohio St. 136; Robinson *v.* Memphis, etc., R. R. Co., 9 Fed. Rep. 129.

[3] Sears *v.* Wingate, 3 Allen, 103.

[4] Bissell *v.* Campbell, 54 N. Y. 353.

The character of bills of lading is now regulated in very many States by statute, and in some of the States bills of lading are declared to be negotiable like other commercial paper. Under those statutes, the bill of lading may be expected to have all the characteristics of bills of exchange, which affect their negotiability.[1]

§ 494. **Effect of attaching bill of lading to draft on vendee for the purchase money.** — Very often, for the protection of the vendor, the bill of lading for the goods shipped is sent to the vendee, attached to a bill of exchange for the purchase money; the object being to make the passing of title to the goods contingent upon the honoring of the bill of exchange. The transfer of the bill of lading, in such a case, is conditional. If it is sent direct to the vendee with an indorsement of the bill of lading to the vendee, together with a bill of exchange on him for the purchase money, the vendee does not acquire title to the goods, until he has honored the bill of exchange.[2] And this is also true, where, as is the more common custom, the bill of lading is attached to a bill of exchange on the vendee, and both are sent to a correspondent for the collection of the draft, and a delivery of the bill of lading upon payment of the draft. In such cases, if the vendee is by the terms of the bill of lading the consignee, he takes the goods into his possession, subject to the right of the holder of the

[1] See Tiedeman *v.* Knox, 53 Md. 612; Hale *v.* Milwaukee, 29 Wis. 482; Price *v.* Wisconsin Co., 43 Wis. 267; Erie Dispatch Co. *v.* St. Louis Co., 6 Mo. App. 172; Greenbaum *v.* Megibben, 10 Bush, 419; Merchants' Bank *v.* Union R. R. Co., 69 N. Y. 373. In Shaw *v.* Railroad Co., 101 U. S. 557, it is held that although bills of lading are made by statute negotiable by indorsement and delivery, it does not follow that they are given every characteristic of negotiability, which bills of exchange possess; and it was there held that the *bona fide* purchaser of a lost or stolen bill of lading cannot claim any better title than what the finder or thief had.

[2] Shepherd *v.* Harrison, L. R. 4 Q. B. 197; 5 H. L. 116; Indiana, etc., Bank *v.* Colgate, 4 Daly, 41; Marine Bank *v.* Wright, 48 N. Y. 1.

bill of exchange to demand payment. The consignee must honor the bill of exchange or surrender the goods.[1] If the carrier delivers the goods to the vendee in contradiction of the terms of the bill of lading, *i.e.*, where the bill of lading provides for the delivery of the goods only on payment of the bill of exchange, neither the vendee nor any innocent purchaser from him will acquire title to the same; and the consignee of the bill of lading with draft attached may recover the goods from any one who has possession of them.[2]

Where the bill of exchange is payable on demand or at sight, the holder of the bill of lading cannot deliver it to the vendee until the bill of exchange is both accepted and paid, provided that the consignor would have had the right to withhold the bill of lading until the purchase money had been paid.[3] But where the bill of exchange is payable in the future, in the absence of a special agreement, the bill of lading is to be delivered to the vendee upon his acceptance of the bill of exchange according to its tenor; and the holder cannot insist upon holding it until the bill of exchange is paid. The drawee of the bill of exchange may

[1] Emery *v.* Irving Nat. Bank, 25 Ohio St. 255; Dows *v.* Nat. Exch. Bank, 91 U. S. 631; National Bank *v.* Merchants' Bank, 91 U. S. 98; Heiskell *v.* Farmers', etc., Bank, 89 Pa. St. 155. The consignee could not in that case retain the purchase money in liquidation of a debt due to him by the consignor. Emery *v.* Irving Nat. Bank, 25 Ohio St. 255. See Jenkins *v.* Brown, 14 Q. B. 496; Schorman *v.* R. R. Co., L. R. 2 Ch. App. 336; Turner *v.* Trustees Liverpool Docks, 6 Exch. 543; Ellerslaw *v.* Magniac, 6 Exch. 570.

[2] Heiskell *v.* Farmers', etc., Bank, 89 Pa. St. 155. See also Dows *v.* Nat. Exch. Bank, 91 U. S. 631; Brandt *v.* Bowlby, 2 B. &. Ad. 932; Seymour *v.* Norton, 105 U. S. 272; Stottenwerck *v.* Thacher, 115 Mass. 224; Alderman *v.* Eastern R. R. Co., 115 Mass. 233.

[3] Heiskell *v.* Farmers', etc., Bank, 89 Pa. St. 225; Bank *v.* Bayley, 115 Mass. 228; Emery *v.* Irving Nat. Bank, 25 Ohio St. 255; National Bank *v.* Merchants Bank, 100 Mass. 104; Dows *v.* Nat. Exch. Bank, 91 U. S. 618; Marine Bank *v.* Wright, 48 N. Y. 1.

refuse to accept, unless the bill of lading is surrendered to him.[1]

[1] Lanfear *v.* Blossom, 1 La. Ann. 148; Marine Bank *v.* Wright, 48 N. Y. 1. In National Bank *v.* Merchant's Bank, 91 U. S. 93, Strong, J., said: "It seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton), specified in the bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instrument can have. If so, in the absence of any express agreement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. * * * If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is, that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. * * * Nor can it make any difference that the draft with the bill of lading has been sent (as in this case) 'for collection.' That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency."

CHAPTER XXVIII.

SUNDRIES.

SECTION 497. Certificates of stock.
498. Receiver's certificates.
499. Warehouse receipts.
500. Letters of credit and circular notes.

§ 497. **Certificates of stock.** — Certificates of stock are also classed as *quasi*-negotiable instruments. But while sometimes the transferee takes a better right in and to the certificate of stock, than what his immediate transferrer had, this arises from the application of other than the principles of negotiability. Thus, if the owner of stock should intrust his agent with the possession of his certificates of stock, payable to bearer, or indorsed in blank, any *bona fide* purchaser from the agent would be able to assert a superior title to that of the principal, although the agent had fraudulently disposed of his property, and against his express instructions. This conclusion is reached by an application of the general principle of agency, that the principal is bound by all the acts of the agent which fall within the scope of his authority.[1]

[1] Johnston *v.* Lafiin, 103 U. S. 800; Cushman *v.* Thayer Mfg. Co., 76 N. Y. 371; Prall *v.* Tilt, 28 N. J. Eq. 480; Mt. Holly Turnpike Co. *v.* Ferree, 2 C. E. Green, 117; Thompson *v.* Toland, 48 Cal. 99; Wood's Appeal, 92 Pa. St. 379; Burton's Appeal, 93 Pa. St. 214; Bridgeport Bank *v.* New York, etc., R. R. Co., 30 Conn. 275; Duke *v.* Cahawba Co., 10 Ala. 82; Fraser *v.* Charleston, 11 S. C. 486; Commercial Bank *v.* Kortright, 22 Wend. 348; N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Leitch *v.* Wells, 48 N. Y. 585; Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41; Holbrook *v.* N. J. Zinc Co., 57 N. Y. 616; McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; Burrall *v.* Bushwick R. R. Co., 75 N. Y. 220; Rumball *v.* Metropolitan Bank, 2 Q. B. Div. 194.

So, likewise, the purchaser of the certificate of stock, who takes possession of the certificate, acquires a better title than the prior purchaser of the same certificate, who makes the purchase by formal agreement or otherwise, without taking into his possession the muniment of title, in the shape of the certificate. And this is true, even though there has been a transfer of the shares to the first purchaser on the books of the corporation.[1] And, on the other hand, if the corporation should make a transfer of the shares on its books to the wrong party, without securing a surrender of the certificate, it would still be liable to the rightful party for the shares of stock which his certificate calls for.[2]

But the general rule is that the purchaser of the certificates of stock gets no better title than his vendor had; and if stock, which is payable to bearer or indorsed in blank, is stolen or found, and unlawfully transferred to an innocent purchaser for value, the real owner may nevertheless recover it.[3]

The customary requirement that the transfer shall be made on the books of the company is for the protection of the corporation, and cannot affect the rights of purchasers from the shareholder, who may acquire, as against every

[1] Driscoll *v.* W. Bradley, etc., C. M. Co., 59 N. Y. 96. See also Bank *v.* Lanier, 11 Wall. 369; Holbrook *v.* N. J. Zinc Co., 57 N. Y. 616. But see *contra* Shropshire Union R. & C. Co. *v.* The Queen, L. R. 7 H. L. Cas. 496.

[2] Cushman *v.* Thayer Mfg. Co., 67 N. Y. 267; Bank *v.* Lanier, 11 Wall. 369; Smith *v.* Am. Coal Co., 7 Lans. 317.

[3] Bereich *v.* Marye, 9 Nev. 312: Burton's Appeal, 93 Pa. St. 214 (*semble*); Railroad *v.* Howard, 7 Wall. 415: "Written contracts are not necessarily negotiable simply because, by their terms, they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them but the assignees took them subject to every equity in the hands of the original owners."

one but the corporation, an absolute right of property in the stock by any of the common methods of assignment of *choses in action*.[1] But there are authorities which hold that only by a transfer on the books of the company, where that is the required mode of transfer, can the purchaser claim a superior title to the stock against the creditors of the transferrer.[2] But, as against the corporation, no transfer of a private nature is valid, unless there has been a corresponding transfer on the books of the corporation, in accordance with the requirement of its by-laws, or the provisions of its charter.[3]

§ 498. **Receivers' certificates.** — When a railroad or other property is placed by the court, on the application of the creditors of the owner, in the hands of a receiver, to be administered upon for the benefit of the creditors, subject to the orders of the court; it is now very common for the court to authorize the receiver to issue certificates, which, in effect, amount to promissory notes, obligating the re-

[1] Black *v.* Zacharie, 3 How. 483; Newberry *v.* Detroit, etc., Iron Co., 17 Mich. 141; Bank of Utica, *v.* Smalley, 2 Cowen, 770; Gilbert *v.* Manchester Mfg. Co., 11 Wend. 627; Sargent *v.* Essex Marine R. R. Co., 9 Pick. 202; Western *v.* Bear River, etc., Co., 6 Cal. 425; Commonwealth *v.* Watmough, 6 Wheat. 139; Stebbins *v.* Phœnix Ins. Co., 3 Paige, 350; Farmers' Bank *v.* Iglehart, 6 Gill, 50; Johnson *v.* Underhill, 52 N. Y. 203; Farmers' Bank *v.* Wasson, 48 Iowa, 338; Johnston *v.* Laflin, 103 U. S. 804.

[2] Sabin *v.* Bank of Worcester, 21 Me. 353; Foster *v.* Essex Bank, 5 Gray, 373; Pinkerton *v.* Manchester, etc., R. R. Co., 42 N. Y. 424; People's Bank *v.* Gridley, 91 Ill. 457.

[3] Union Bank *v.* Laird, 2 Wheat. 390, Story, J.: "No person can acquire a legal title to any shares except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice." See also Brent *v.* Bank of Washington, 10 Pet. 596; German Security Bank *v.* Jefferson, 10 Bush, 328; Rogers *v.* Huntington Bank, 12 Serg. & R. 73; Farmers' Bank *v.* Iglehart, 6 Gill, 50.

ceiver to pay the amount called for by the certificate out of any moneys in his hands as receiver.

It has been very generally held that the receiver's certificates are not negotiable, and that the transferee takes them subject to all existing defenses, although they are made payable to order or to bearer; principally on the ground that the certificate is drawn on a particular and uncertain fund, and does not create against any one any absolute and unconditional liability.[1] It has been held that, since receivers cannot issue certificates for any other purpose than to raise funds, with which to make necessary repairs, and cannot borrow money for the purpose of building a road, the certificate, issued for the prohibited purpose, is void in the hands of any one, if the purpose of its issue is stated on the face of the certificate.[2]

§ 499. **Warehouse receipts.** — During the last fifty years, grain of all kinds has been handled by merchants in bulk; and, for the more convenient transportation and transfer of the same, it is kept in bulk in public ware-

[1] "Nearly every quality essential to the negotiability of commercial paper is wanting in such certificates. In the first place they are not payable unconditionally out of any fund; whether, in any event, they are payable in full, depends upon the question, whether the fund under the control of the court is sufficient for that purpose. That fact cannot be known except upon inquiry into the amount of such certificates issued by the officer authorized to act, and as to the value of the fund to be administered. A bill of exchange is not good when drawn payable out of a particular fund that is uncertain and contingent. The fund out of which payment is to be made must be certain, as well as the obligation of the maker or drawer. Then, again, there is no personal liability upon any one for the payment of such certificates, and, as we have seen, one essential quality of negotiable paper is the personal liability of the maker." Turner *v.* Peoria, etc., R. R. Co., 95 Ill. 145, 146. See also Stanton *v.* Alabama, etc., R. R. Co., 2 Woods U. S. C. C. 506; Bank of Montreal *v.* Chicago, etc., R. R. Co., 48 Iowa, 518; Newbold *v.* Peoria & Springfield R. R. Co., 5 Brad. 367; Union Trust Co. *v.* Chicago & Lake Huron R. R. Co., 7 Fed. Rep. 513.

[2] Credit Co. *v.* Ark. Cent. R. R. Co., 15 Fed. Rep. 46.

houses, called elevators, where all the grain received is stored in large bins according to quality, and irrespective of any prior ownership. Upon receiving the grain, the warehouseman or elevator company issues documents, in which the receipt of a certain quantity of grain of a certain quality and kind is acknowledged, and the promise is made to deliver it to the order of the depositor. These warehouse receipts are taken by the depositor or the exchanges of the cities as the representative of the grain itself; and when the grain, which they represent, is sold, the certificates are transferred by indorsement and delivery, or by delivery alone, if made deliverable to bearer or indorsed in blank. And the title to the grain will be as effectually transferred, as if the grain itself had been delivered.

In consequence of the reliance placed by the mercantile world upon the absolute liability of the warehouseman on his receipt, a disposition has been manifested to apply the principles of negotiable instruments to these receipts and to give to the *bona fide* holder the same superior rights as such a holder of bills and notes has. And in many of the States, the same end has been attained by the enactment of statutes. But independently of statute, it is very generally held that the warehouse receipt is not a negotiable instrument, the principal objection being that the warehouse receipt calls for the delivery of goods, instead of the payment of money.[1] The receipt is so far non-negotiable, that the warehouseman is not liable even to a *bona fide* holder if his agent has issued a receipt without

[1] Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419; Burton *v.* Curyea, 40 Ill. 320; Canadian Bank *v.* McCrea, 40 Ill. 281 (see Illinois Statute on the subject); Spangler *v.* Butterfield, 6 Col. 356; Solomon *v.* Bushnell, 11 Oreg. 272 (50 Am. Rep. 475); Durr *v.* Hervey, 44 Ark. 301 (51 Am. Rep. 594); Louisville Bank *v.* Boyce, 78 Ky. 42; Griswold *v.* Haven, 25 N. Y. 595. But see Allen *v.* Maury, 66 Ala. 10; Fourth Nat. Bank *v.* St. Louis Compress Co., 11 Mo. App. 333.

getting possession of the goods.[1] But, on the other hand, if the goods have been stored, and the warehouse receipt has been rightfully issued, the warehouseman cannot deliver the goods to any one but the lawful holder of the receipt; and the warehouseman is liable to the holder of the receipt, if the goods have been delivered to any one else, without the production and surrender of the receipt properly indorsed.[2]

The warehouseman is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable.[3]

When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt-holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting.[4]

§ 500. **Letters of credit and circular notes.** — The letter of credit is a written assurance that the writer will pay a draft or drafts drawn on him to the limit of the amount stated in the letter by the person named. If the letter is addressed to a particular individual or individuals, it is called a special letter of credit, and no one but the person or persons named can advance money on the same, and then recover of the letter writer.[5] But if it is not addressed to

[1] Second Nat. Bank *v.* Walbridge, 19 Ohio St. 419; Griswold *v.* Haven, 25 N. Y. 595; Burton *v.* Curyea, 40 Ill. 320; McBombie *v.* Spader, 3 Thomp. & C. 690; 1 Hun, 193. See *contra* McNiel *v.* Hill, 1 Woolw. C. C. 96.

[2] Harris *v.* Bradley, 2 Dill. C. C. 284; Hale *v.* Milwaukee Dock Co., 29 Wis. 492; Shepardson *v.* Cary, 29 Wis. 34; Cral *v.* Philips, 66 Ill. 216; Greenbaum *v.* Majibben, 10 Bush, 419. But see Mortimore *v.* Ragsdale, 62 Miss. 86.

[3] Mchanics', etc., Ins. Co. *v.* Kiger, 103 U. S. 352.

[4] Daws *v.* Eckstone, 1 McCrary C. C. 434.

[5] Robins *v.* Bingham, 4 Johns. 476; Walsh *v.* Bailie, 10 Johns. 180; Taylor *v.* Wilmore, 10 Ohio, 490.

any one in particular, it is called a general letter of credit, and any one, by advancing money on the faith of the letter, may recover back the same from the letter writer.[1]

The circular note differs only from a special letter of credit, in that it authorizes any one of a list of correspondents in different places, which are given in the letter, to advance money on drafts drawn on the faith of the letter of credit. This form of letter of credit is very commonly used by tourists throughout the world, certain banking firms making a special business of furnishing travelers with these letters of credit or circular notes.[2]

Where the letter of credit authorizes the drawing of a bill of exchange on the letter writer, it amounts to an acceptance of such a bill, when it is drawn.[3]

[1] Lawrason *v.* Mason, 3 Cranch, 492, Marshall, C. J.: "There is an actual assumpsit to all the world, and any person who trusts, in consequence of that promise, has a right of action." See also to the same effect Watson's Exrs. *v.* McLaren, 19 Wend. 565; 26 Wend. 425; North Cumberland Bank *v.* Eyer, 58 Pa. St. 102, 103; Pollock *v.* Helm, 54 Miss. 1 (28 Am. Rep. 342); Boyce *v.* Edwards, 4 Pet. 121; Adams *v.* Jones, 12 Pet. 207; Russell *v.* Wiggin, 2 Story, 213; Brickhead *v.* Brown, 5 Hill, 642; Union Bank *v.* Coster, 3 N. Y. 214; 2 Denio, 375.

[2] 2 Parsons' N. & B. 109.

[3] Agra *v.* Masterman's Bank, 2 L. R. Ch. App. 297; In re Blakely Co., 3 L. R. Ch. App. 154; Arents *v.* Commonwealth, 18 Gratt. 769; Bissell *v.* Lewis, 4 Mich. 450; Ulster Co. Bank *v.* McFarland, 5 Hill, 434; Nelson *v.* First Nat. Bank, 48 Ill. 39. But see *contra* Boyce *v.* Edwards, 4 Pet. 11; Schimmelpennick *v.* Bayard, 1 Pet. 264; Coolidge *v.* Payson, 2 Wheat. 66; where it is held that the letter writer cannot be sued as acceptor, unless the letter of credit specifically describes the bill which has been drawn. See also *ante*, § 226 on the effect of agreements to accept.

CHAPTER XXIX.

CONFLICT OF LAWS IN RELATION TO COMMERCIAL PAPER.

SECTION 506. General principles.
507. What law governs the liability of maker, drawer and acceptor.
508. What law governs the liability of indorsers.
509. What law governs formalities in respect to presentment, protest and notice.
510. Law applicable to stamps on commercial paper.
511. Law relating to payment, interest and damages.

§ 506. **General principles.** — In order to carry out the intentions of the parties to legal transactions, their contracts and other transactions must be construed in the light of that law, which the parties themselves had in contemplation. And although laws have not, *proprio vigore*, any extra-territorial effect, they are given such effect, by international comity, in order that the intentions of the parties may be effectuated. When a court undertakes to enforce a foreign law, because the parties to the suit had assumed obligations in contemplation of that law, it is simply giving a special application to the general rule of construction, that that construction must prevail which will best carry out the intentions of the parties.

But the courts are not bound to recognize in every instance the application of foreign laws to the cause at issue. It is nothing more than a matter of comity; and if the foreign laws sanction what is an offense against domestic morals and public policy, they will not be enforced by the courts, in the settlement of any cause of action.[1]

[1] Forbes *v.* Cochrane, 2 Barn. & C 448; Armstrong *v.* Toler, 11 Wheat. 258; Mahorner *v.* Hooe, 9 Sm. & M. 247; Ohio Ins. Co. *v.* Edmundson, 5

But the courts do not take judicial notice of the laws of other countries. When they are relied upon in the prosecution of a suit, they must be proved like any other fact; otherwise the foreign law will be presumed to be the same as the law of the forum.[1] And where there has been a separation of two countries, which were once subject to the same government and to the same laws, the courts will presume, in the absence of proof to the contrary, that the same rules of law prevail in both countries which were in force before the separation.[2]

Only those general rules will be stated here, which have application to commerce. In carrying out this proposition, we find the most important rule to be that the law of the place where the contract was made governs the interpretation and construction of the contract. And a contract is to be enforced everywhere, as it appears in the light of the *lex loci contractus*.[3] It is, however, not the law of the place

La. 295; Pearsall *v.* Dwight, 2 Mass. 84; Donovan *v.* Pitcher, 53 Ala. 411; Robinson *v.* Bland, 2 Burr. 1077, Wilmot, J.: "In many countries a contract may be maintained by a courtesan for the price of the prostitution, and one may suppose an action to be brought here upon such a contract, which arose in such a country. But that would never be allowed in this country."

[1] Hunt *v.* Adams, 44 N. Y. 27; Fouke *v.* Fleming, 13 Md. 392; Legg *v.* Legg, 8 Mass. 100; Harper *v.* Hampton, 1 Harr. & J. 687; Martin *v.* Martin, 1 Smed. & M. 176; Hill *v.* Wilker, 41 Ga. 449; Kuenzi *v.* Elvers, 14 La. Ann. 391; Dunn *v.* Adams, 1 Ala. 529; Whidden *v.* Seelye, 40 Me. 247; Bean *v.* Briggs, 4 Iowa, 467; Bernard *v.* Barry, 1 Greene (Iowa), 388.

[2] O'Rourke *v.* O'Rourke, 43 Mich. 58; Flats *v.* Mulhall, 72 Mo. 522; Dickinson *v.* Hoomes, 8 Gratt. 408; Arayo *v.* Currill, 1 La. 541. See Hill *v.* Wilker, 41 Ga. 449.

[3] Evans *v.* Anderson, 78 Ill. 558; Faut *v.* Miller, 17 Gratt. 47; Palmer *v.* Yarrington, 1 Ohio St. 253; Smith *v.* Mead, 3 Conn. 253; Ansted *v.* Sutter, 30 Ill. 164; Van Shaick *v.* Edwards, 2 Johns. Cas. 355; Robinson *v.* Bland, 2 Burr. 1077; Hyde *v.* Goodnow, 3 Comst. 266; Ford *v.* Buckeye Ins. Co., 6 Bush, 133; Andrews *v.* Pond, 13 Pet. 65; Andrews *v.* Herriott, 4 Cow. 510; Thayer *v.* Elliott, 16 N. H. 102; Pearsall *v.* Dwight, 2 Mass. 84; Kanaga *v.* Taylor, 7 Ohio St. 134; Moore *v.* Clopton, 22 Ark.

where the contract was signed, or executed, but the law of the place where the contract was consummated by delivery or otherwise, which governs the construction of the contract.[1] But a contract is presumed to have been delivered or otherwise consummated in the place of its date; and, although, as between the original parties, it may be shown that the contract had been completed elsewhere, the presumption that the place of the date is the place of the contract becomes conclusive, at least to subsequent holders of commercial paper, who take the paper without notice of the real place of execution.[2]

This general rule is modified by two other rules as follows: —

(1.) If the contract is made in one place, and it is agreed to be performed in another place, the law of the place of performance, instead of the *lex loci contractus*, will govern

125; Mason *v.* Dousay, 35 Ill. 424; Scudder *v.* Union Nat. Bank, 91 U. S. 406.

[1] Freese *v.* Brownell, 35 N. J. L. 286; Campbell *v.* Nichols, 33 N. J. L 81; Gay *v.* Rainey, 89 Ill. 221; Hart *v.* Wills, 52 Iowa, 56; Hyde *v.* Goodnow, 3 Comst. 266; Faut *v.* Miller, 17 Gratt. 47; Overton *v.* Bolton, 9 Heisk. 762; Lawrence *v.* Bassett, 5 Allen, 140; Cook *v.* Moffat, 5 How. 295; Davis *v.* Coleman, 7 Ired. 435; Whiston *v.* Stodder, 8 Mart. (La.) 95; Cook *v.* Litchfield, 5 Sand. 330; Davis *v.* Clemson, 6 McLean, 622; Bell *v.* Packard, 69 Me. 105; Stanford *v.* Pruet, 27 Ga. 243; Gay *v.* Rainey, 89 Ill. 221. In First Nat. Bank *v.* Morris, 1 Hun, 680, it was held that if a bill is accepted in New York for the accommodation of the drawer who resides and negotiates the bill in Massachusetts, the Massachusetts law governs and not the New York law. See also Bank of Georgia *v.* Lewin, 45 Barb. 340; Bowen *v.* Bradley, 9 Abb. (N. S.) 395. But see *contra* Jewell *v.* Wright, 30 N. Y. 259.

[2] Lemig *v.* Ralston, 23 Pa. St. 139, Lewis, J.: "It bore the dress of a bill of exchange drawn in Pennsylvania; and upon the principle that every one is presumed to produce all the consequences to which his acts naturally and necessarily tend, the presumption is that the defendants intended that the purchasers of it should receive it under the belief that it was a bill drawn in Philadelphia in the usual course of business." The bill was negotiated in London. See also to same effect, Snaith *v.* Mingay, 1 Maule & Sel. 87; Nat. Bank *v.* Smoot, 1 McArth. 371; Barker *v.* Sterne, 9 Exch. 684.

the contract.[1] If a contract is performable in part in one place, and in part in another, each part will be governed by the law of the place in which it is performable.[2] But the place of payment, in the absence of express statements to the contrary, is presumed to be the same as the place where the contract was made.[3] However, where both parties are *in transitu* at the place where the contract is made, the place of payment will be presumed to be the domicil of the obligor.[4] But if only one of the parties is *in transitu*, the place of payment will be presumed to be where the contract was made.[5]

(2.) Everything relating to the remedy is determined by the law of the forum, the place where the action is brought, and not by the law of the place where the contract was made or to be performed.[6] But whenever any question,

[1] Andrews *v.* Pond, 13 Pet. 65; Belle *v.* Bruen, 1 How. 182; Prentiss *v.* Savage, 13 Mass. 23; Smith *v.* Mead, 3 Conn. 253; Hyde *v.* Goodnow, 3 Comst. 266; Thompson *v.* Ketchum, 4 Johns. 285; Blodgett *v.* Durgin, 32 Vt. 361; Hunt *v.* Standart, 15 Ind. 33; Woodruff *v.* Hill, 116 Mass. 310; Stricker *v.* Tinkham, 35 Ga. 176; Goddin *v.* Shipley, 7 B. Mon. 575; Fanning *v.* Consequa, 17 Johns. 511; Chapman *v.* Robertson, 6 Paige, 627; Robinson *v.* Bland, 2 Burr. 1077; Thorp *v.* Craig, 10 Iowa, 461; Freese *v.* Brownell, 35 N. J. L. 285; Freeman's Bank *v.* Ruckman, 16 Gratt. 126.

[2] Pomeroy *v.* Ainsworth, 22 Barb. 118; Young *v.* Harris, 14 B. Mon. 556.

[3] Blodgett *v.* Durgin, 32 Vt. 361; Short *v.* Trabue, 4 Met. (Ky.) 299; Todd *v.* Bank of Ky., 3 Bush, 626; Wilson *v.* Lazier, 11 Gratt. 477; Backhouse *v.* Selden, 29 Gratt. 586; Thompson *v.* Ketchum, 8 Johns. 189; 4 Johns. 285.

[4] Vanzant *v.* Arnold, 31 Ga. 210; Wharton's Confl. of Laws, § 402. See Bullard *v.* Thompson, 35 Tex. 318.

[5] Foden *v.* Sharp, 4 Johns. 183. See Grimshaw *v.* Bender, 6 Mass. 157.

[6] *Who may sue*, Foss *v.* Nutting, 14 Gray, 484; Goodwin *v.* Jones, 3 Mass. 514; Stearns *v.* Burnham, 5 Greenl. 261; Fisk *v.* Brackett, 32 Vt. 798; Folcett *v.* Ogden, 1 H. Bl. 135. *Statute of limitations*, Clark *v.* Conner, 2 Strobh. 346; Mineral Point R. R. Co. *v.* Barron, 83 Ill. 367; Nicolls *v.* Rodgers, 2 Paine C. C. 437; British Linen Co. *v.* Drummond, 10 B. & C. 903; Williams *v.* Jones, 13 East, 439; Jones *v.* Hook, 2 Rand. 303.

apparently pertaining to the remedy, raises an inquiry into the nature and validity of the substantive rights of the parties to the contract, then it is to be determined by the law of the place where the contract was made or to be performed, and not by the law of the forum.[1]

Inasmuch as commercial instruments, with their acceptances, guaranties and indorsements, constitute an aggregation of contracts, instead of being only one contract; the application of these general principles to them requires a more detailed consideration.

§ 507. **What law governs the liability of maker, drawer and acceptor.** — It is plain that the obligation of the maker of a note is governed by the law of the place where the

Action may be brought, although it is already barred by the statute of limitation of the *locus contractus*. Bulger *v.* Roche, 11 Pick. 36; Putnam *v.* Dike, 13 Gray, 535; Huber *v.* Steiner, 2 C. & M. 629; Power *v.* Hathaway, 43 Barb. 214; Estes *v.* Kyle, Meigs, 34. But see *contra* Harrison *v.* Stacy, 6 Rob. (La.) 15; Goodman *v.* Munks, 8 Port. (Ala.) 89. *The form of action*, Bank of United States *v.* Donally, 8 Pet. 361; Le Roy *v.* Beard, 8 How. 451; Douglass *v.* Oldham, 6 N. H. 150; Warren *v.* Lynch, 5 Johns. 239; Thrasher *v.* Everhart, 3 Gill & J. 319; Williams *v.* Haynes, 27 Iowa, 251; Andrews *v.* Herriott, 4 Cow. 508; Steele *v.* Carle, 4 Dana, 381. *Questions of evidence*, Bain *v.* Whitehaven, etc., R. R. Co., 3 H. L. Cas. 1; Downer *v.* Cheesebrough, 36 Conn. 39; Leroux *v.* Brown, 12 C. B. 801; 14 Eng. L. & Ex. 247. *Process*, Dela Veda *v.* Vianna, 1 B. & Ad. 284; Smith *v.* Spinolla, 2 Johns. 198; White *v.* Canfield, 7 Johns. 117; Licard *v.* Whale, 11 Johns. 194; Peck *v.* Hozier, 14 Johns. 346; Hindley *v.* Marean, 3 Mason, 90. But see *contra* Melum *v.* Fitzjames, 1 B. & P. 133; Talleyrand *v.* Boulanger, 3 Ves. jr. 447. Set-off and other defenses, which do not involve a consideration of the nature and validity of the contract. Gibbs *v.* Howard, 2 N. H. 296; Bank of Gallipolis *v.* Trimble, 6 B. Mon. 600; Mineral Point R. R. Co. *v.* Barron, 83 Ill. 367; Bliss *v.* Houghton, 13 N. H. 126.

[1] Any right or defense issuing out of the negotiable character of the instrument, Trimbey *v.* Vigmer, 1 Bing. N. C. 159; Lee *v.* Selleck, 33 N. Y. 615; O'Callaghan *v.* Thomond, 3 Taunt. 82; Woodruff *v.* Hill, 116 Mass. 310; Harrison *v.* Edwards, 12 Vt. 651; Allen *v.* Bratton, 47 Miss. 129. The number of attesting witnesses, Wharton's Confl. of Laws, § 769. The effect of the evidence, Mason *v.* Dausar, 35 Ill. 424.

note is made or to be performed.[1] The acceptor's liability, being dependent upon his acceptance, is governed by the law of the place where he accepts the bill, when no other place of payment is specified. If there be no expressed place of payment, the bill is payable in the place where it was accepted; but if a different place of payment is specified in the bill, then the liability of the acceptor is governed by the law of the place of payment.[2] And the same rule holds good, where a promise to accept is made and communicated to the other parties, before the bill is drawn. The acceptance is governed by the law of the place where the bill is accepted.[3]

The drawer's liability, it being a guaranty that the drawee will accept and pay the bill, will be governed by the law of the place where the bill was drawn. Although the bill was primarily payable elsewhere, the drawer's secondary liability was to pay where the bill was drawn.[4]

[1] Chartres *v.* Cairnes, 16 Mart. (La.) 1; Stacy *v.* Baker, 1 Scam. 417; Wilson *v.* Lazier, 11 Gratt. 482; Yeatman *v.* Cullen, 5 Blackf. 241; Brabston *v.* Gibson, 9 How. 263; Harrison *v.* Edwards, 12 Vt. 648; Lawrence *v.* Bassett, 5 Allen, 140.

[2] Musson *v.* Lake, 4 How. 262; Wilde *v.* Sheridan 21 L. J. R. Q. B. 260; Bright *v.* Judson, 47 Barb. 29; Frazier *v.* Warfield, 9 Smed. & M. 220; Don *v.* Lipman, 5 Clarke & F. 1; Worcester Bank *v.* Wells, 8 Metc. 107; Lizardie *v.* Cohen, 3 Gill, 430; Boyce *v.* Edwards, 4 Pet. 111; Freese *v.* Brownell, 35 N. J. L. 286; Everett *v.* Vendryes, 19 N. Y. 436; Duerson's Admr. *v.* Alsop, 27 Gratt. 241; Bainbridge *v.* Wilcocks, 1 Bald. 536; Cooper *v.* Earl of Waldergrave, 2 Beav. 282; Lewis *v.* Owen, 4 B. & Ald. 654; Todd *v.* Bank of Ky., 3 Bush, 626.

[3] Russell *v.* Wiggin, 2 Story, 230; Bissell *v.* Lewis, 4 Mich. 459; Carnegie *v.* Morrison, 2 Metc. 397. But see *contra* Lonsdale *v.* Lafayette Bank, 18 Ohio, 142. "The letter (of credit) is dated New Orleans (Louisiana), and the acceptances were to be there; but the contract was closed in Cincinnati (Ohio); the bills were to be drawn and indorsed there; the money upon them to be obtained, and the produce brought there. With such a state of facts we suppose that Ohio furnishes the law of the contract.

[4] Everett *v.* Vendryes, 19 N. Y. 436; Raymond *v.* Holmes, 11 Texas, 55; Lennig *v.* Ralston, 22 Pa. St. 137; Bank of U. S. *v.* U. S., 2 How. 711;

§ 508. **What law governs the liability of an indorser.** — Since the indorser makes a new contract, — is said by indorsement to draw a new bill on the maker of a note or the drawee of a bill, — the liability of the indorser is determined by the law of the place where the indorsement was made.[1] In consequence of this ruling, we may have each successive indorsement governed by a different law and different conclusions reached on the same state of facts. "Thus, if a bill be drawn or note made in one State and indorsed successively in several others, the indorser in one State may be merely liable as a surety;[2] in another, he may not be liable until the holder has exhausted his remedy against the acceptor or maker;[3] while, in a third, he may be liable according to the general principle of the law merchant, immediately upon due notice of dishonor.[4] Although this ruling is supported by an almost unbroken line of authorities, it has been very warmly opposed by some law writers, on the ground that the liability of the drawer

Allen *v.* Kemble, 6 Moore P. C. 314; Gibbs *v.* Fremont, 20 Eng. L. & Eq. 555; 9 Exch. 25; Bailey *v.* Heald, 17 Texas, 102; Freese *v.* Brownell, 35 N. J. L. 286; Hunt *v.* Standart, 15 Ind. 33; Kuenzi *v.* Elvers, 14 La. Ann. 391; Price *v.* Page, 24 Mo. 67; Bonedon *v.* Page, 24 Mo. 595; Page *v.* Page, 24 Mo. 596; Crawford *v.* Branch Bank, 6 Ala. 15; Wood *v.* Gibbs, 35 Miss. 560; Musson *v.* Lake, 4 How. 262; Roquette *v.* Overman, 16 Q. B. L. R. 525; Duerson's Admr. *v.* Alsop, 27 Gratt. 241.

[1] Lee *v.* Selleck, 33 N. Y. 615; 32 Barb. 522; Williams *v.* Wade, 1 Metc. 82; Dundas *v.* Bowler, 3 McLean, 400; Slocum *v.* Pomeroy, 6 Cranch, 221; Short *v.* Trabue, 4 Metc. (Ky.) 299; Trabue *v.* Short, 5 Cold. 293; Tradue *v.* Short, 18 La. Ann. 257; Greathead *v.* Walton, 40 Conn. 226; Cook *v.* Litchfield, 5 Seld. 280; 5 Sandf. 330; Hyde *v.* Goodnow, 3 Comst. 270; Dow *v.* Rowell, 12 N. H. 49; Aymar *v.* Sheldon, 12 Wend. 443; Nat. Bank of Michigan *v.* Green, 33 Iowa, 140; Yeatman *v.* Cullen, 5 Blackf. 240; Canton *v.* Barnes, 50 Ala. 403; Musson *v.* Lake, 4 How. 262.

[2] Ingersoll *v.* Long, 4 Dev. & Bat. 293.

[3] Violett *v.* Patton, 5 Cranch, 142; Williams *v.* Wade, 1 Metc. 82; Trabue *v.* Short, 18 La. Ann. 257; Hunt *v.* Standart, 15 Ind. 33; Howell *v.* Wilson, 2 Blackf. 418; Slocum *v.* Pomeroy, 6 Cranch, 221.

[4] McDonald *v.* Bailey, 14 Me. 101.

and indorser should be uniform with that of the maker or acceptor." [1]

But the following distinction is to be made in this connection, viz.: that it is only the new liability created by the indorsement which is governed by the law of the place of indorsement.[2] In other words, the liability of the indorser to his indorsee, in the character of an indorser, is determined by that law. But the rights of the transferee or indorsee against the original parties to the instrument are determined by the law of the place where the contract was made or to be performed. Each successive holder of a commercial instrument has the same rights against the acceptor or maker, it matters not where the transfers were made. These right are determined by the *lex loci contractus vel solutionis*.[3]

[1] 1 Daniel's Negot. Inst., § 901; 2 Kent's Com. 459, 460; 2 Parsons' N. & B. 347; Shanklin *v.* Cooper, 8 Ind. 42, overruled by Hunt *v.* Standart, 15 Ind. 33. See Raymond *v.* Holmes, 11 Tex. 60; Mullen *v.* Morris, 2 Barr. 87.

[2] Bank of U. S. *v.* Donally, 8 Pet. 361; Nichols' Ex. *v.* Porter, 2 Hagans, 13; Carlisle *v.* Chambers, 4 Bush, 269; Lee *v.* Selleck, 33 N. Y. 615; 32 Barb. 522.

[3] Robertson *v.* Burdekin, 1 Ross. Lead. Cas. 812, Lord Medwyn: "It is often said, and truly, that by indorsation a new contract is created; and I was puzzled, at one time, with the circumstance, that the indorsation in the present case was by an Englishman to an Englishman, and executed in England; and it appeared difficult for me to conceive how such a contract could be validly entered into in a country where such an indorsation was not valid, so as not to constitute a right in favor of the one, or an obligation against the other. But, although it might be consistent with principle to allow the law of the place where the indorsement was made to regulate its effect between indorser and indorsee, as between the indorsee and the maker no new contract is created, the contract between them remaining the same original contract, regulated by the *lex loci contractus;* the indorsee is merely substituted in the place of the original payee; and the maker remains under the same liability he contracted at the time he made the note, which was to pay to the payee, or to the holder by indorsement; and he cannot object to the form of the transfer, if it be made according to the law which gives it its character, and regulates the quality of the note — that is, in the present case,

The law of the forum determines always in whose name the suit may be brought, and to that extent governs the determination of the title of the indorsee.[1]

§ 509. **What law governs formalities in respect to presentment, protest and notice.** — The authorities are all agreed that the required formalities in respect to presentment are determined by the law of the place of acceptance or payment.[2] And so, also, does the law of the place of payment determine whether, and how many, days of grace are allowed.[3]

Likewise, the law of the place of payment determines the requirements in respect to protest.[4]

But the authorities are divided as to what law governs the requirements in respect to notice of dishonor. Some of the cases, on the ground that the requirement as to notice is a condition to the new liability created by indorsement, hold that it must be determined in respect to each successive indorsement by the law of the places of indorsement.[5] But,

according to the law of Scotland." See to same effect Lebel *v.* Tucker, 2 Q. B. 77; *s. c.* 8 Best & Smith, 830; Trimbey *v.* Vignier, 4 M. & Scott, 695; 1 Bing. N. C. 151; 6 C. & P. 25.

[1] Roosa *v.* Crist, 17 Ill. 450; Harper *v.* Butler, 2 Pet. 239.

[2] Rothschild *v.* Currie, 1 Ad. & El. (N. S.) 434; Phillips *v.* Im. Thurn, 1 C. P. L. R. 463; Rouquette *v.* Overman, 10 Q. B. L. R. 525; Todd *v.* Neal's Admrs., 49 Ala. 266.

[3] Bank of Washington *v.* Triplett, 1 Pet. 25; Vidal *v.* Thompson, 11 Mart. (La.) 23; Bryant *v.* Edson, 8 Vt. 325; Ayman *v.* Sheldon, 12 Wend. 43; Jewell *v.* Wright, 30 N. Y. 264; Thorp *v.* Craig, 10 Iowa 461; Blodgett *v.* Durgin, 32 Vt. 361; Hatcher *v.* McMorine, 4 Dev. 124; Bowen *v.* Newell, 13 N. Y. 290; Goddin *v.* Shipley, 7 B. Mon. 575; Bank of Orange Co. *v.* Colby, 12 N. H. 520; Rothschild *v.* Currie, 1 Ad. & El. (N. S.) 43; Cribbs *v.* Adams, 13 Gray, 597; Walsh *v.* Dart, 12 Wis. 635.

[4] Townsley *v.* Sumrall, 2 Pet. 170; Raymond *v.* Holmes, 11 Tex. 54; Ticknor *v.* Roberts, 11 La. 16; Aymar *v.* Sheldon, 12 Wend. 444; Williams *v.* Putnam, 14 N. H. 543; Todd *v.* Neal's Admr., 49 Ala. 266; Carter *v.* Union Bank, 7 Humph. 548; Snow *v.* Perkins, 2 Mich. 238; Bank of Rochester *v.* Gray, 2 Hill, 227; Ross *v.* Bedell, 5 Duer, 462.

[5] Aymar *v.* Sheldon, 12 Wend. 444; Lee *v.* Selleck, 33 N. Y. 815; 32

in consideration of the heavy burden such a rule would impose upon the holder of the paper, it is maintained by other authorities that the requirements as to notice of dishonor are determined by the law of the place of payment.[1]

§ 510. **Law applicable to stamps on commercial paper.** In consequence of the general rule that the courts of one country will not aid in the enforcement of the revenue laws of another country,[2] it is a matter of some doubt whether the requirement of a stamp on a negotiable instrument by the law of the place where the contract was made, would be enforced by the courts of any other State. The following may, however, be relied upon as the conclusion of the authorities. If the *lex loci contractus* declares the instrument to be void for want of a stamp, then the instrument will be pronounced void everywhere; but if the want of a stamp only has the effect of taking away the admissibility of the instrument in evidence, it is treated as a question of evidence, and therefore to be determined by the law of the forum.[3]

But, unlike the general rule, the stamp is required or not, in the execution of a negotiable instrument, according to the law of the place where the contract was made, and not where it is to be performed.[4]

Barb. 522; Raymond *v.* Holmes, 11 Tex. 55. See also Williams *v.* Putnam, 14 N. H. 543; Snow *v.* Perkins, 2 Mich. 238.

[1] Rothschild *v.* Currie, 1 Ad. & El. (N. S.) 43; 2 Parsons' N. & B. 344, 355; Todd *v.* Neal's Exr. 49 Ala. 266; 1 Daniel's Negot. Inst., §§ 911, 912.

[2] Ludlow *v.* Van Rensselaer, 1 Johns. 94; James *v.* Catherwood, 2 Dow. & R. 190; Lambert *v.* Jones, 2 Pat. & Heath, 144; Skinner *v.* Tinker, 34 Barb. 333.

[3] Alves *v.* Hodgson, 7 T. R. 241; Bristow *v.* Sequeville, 5 Exch. 279; Faut *v.* Miller, 17 Gratt. 47; Clegg *v.* Levy, 3 Camp, 166. But see Wynne *v.* Jackson, 2 Russ. 251; James *v.* Catherwood 2 Dow. & Ry. 190; Story on Bills, § 137; Wharton's Confl. of Laws, §§ 686, 688.

[4] Vidal *v.* Thompson, 11 Mart. (La.) 23; 2 Parsons' N. & B. 331; Story on Bills, § 159; Wharton's Confl. of Laws, § 698 *et seq.*

§ 511. **Law relating to payment, interest and damages.** — The obligation of the parties, its character and its extent, is of course determined by the law of the place where that obligation is to be performed. And that includes not only a consideration of the principal indebtedness, but also the rate of interest, if any at all, where none is expressly stipulated for. And a different rule will apply to each one of the parties to the same instrument, if they reside in different places; the drawer's liability being determined by the law of the place where the bill was drawn, and the indorser's by the law of the place where the instrument was indorsed.[1]

The same holds good as to the damages for the dishonor of the instrument.[2] In respect to interest, the maker of a note or the acceptor of a bill has a right to elect whether the legality of the rate shall be determined by the law of the place of payment, or of the place of execution. If a rate of interest is expressly provided for, which is usurious according to the law of the place of execution, and lawful according to the law of the place of payment, or *vice versa*, it will be lawful interest, and may be recovered anywhere,

[1] *Interest*, Campbell *v.* Nichols, 33 N. J. L., 81; Arnott *v.* Redferne, 2 C. & P. 88; De Wolf *v.* Johnson, 10 Wheat. 367; Andrews *v.* Pond, 13 Pet. 65; Davis *v.* Coleman, 7 Ired, 424; Brainard *v.* Marshall, 8 Pick. 194; Hawley *v.* Sloo, 12 La. Ann. 815; Peck *v.* Mayo, 14 Vt. 33; Gibbs *v.* Fremont, 20 E. L. & Eq. 555; Smith *v.* Smith, 2 Johns. 235; Austin *v.* Imus, 23 Vt. 286; Montgomery *v.* Budge, 3 Dow & C. 297; Consequa *v.* Willings, 1 Pet. C. C. 225; Schofield *v.* Day, 20 Johns. 102; Summers *v.* Mills, 21 Tex. 77; Boyce *v.* Edwards, 4 Pet. 111; Hunt's Exr. *v.* Hall, 37 Ala. 702; Thompson *v.* Powles, 2 Sim. 194. What rate of interest collectible of drawers and indorsers, see Crawford *v.* Branch Bank, 6 Ala. 15; Bank of United States *v.* United States, 2 How. 711; Gibbs *v.* Fremont, 20 Eng. L. & Eq. 555; 9 Exch. 25; Peck *v.* Mayo, 14 Vt. 33; Austin *v.* Imus, 33 Vt. 286; Bayley *v.* Heald, 17 Tex. 102. See Mullen *v.* Morris, 2 Barr. 87: Haurick *v.* Andrews, 9 Port. (Ala.) 10.

[2] Slocum *v.* Pomeroy, 6 Cranch, 221; Hazelhurst *v.* Kean, 4 Yeates, 19; Gibbs *v.* Fremont, 9 Exch. 25; Hendricks *v.* Franklin, 4 Johns. 119; Hicks *v.* Brown, 12 Johns. 142; Prentiss *v.* Savage, 13 Mass. 20; Lennig *v.* Ralston, 23 Penn. 137.

even in the place where the rate is declared to be usurious.[1] But where the rate of interest is usurious according to the law of both the place of the contract and the place of payment, the effect of the violation of the law upon the instrument, together with the penalties imposed, is to be determined by the law of the place where the instrument was made, and not where it was to be paid.[2]

If the provision of the law, which applies in the determination of the legality and rate of interest and damages, is not established by proper testimony, the law of the forum will govern.[3]

In reducing the negotiable instrument to a judgment, in some other place than the place of payment, and in a place where there is a different currency in use, the amount of the indebtedness must be computed first in the currency of the place of payment, and then ascertain the equivalent of that sum, plus the current rate of exchange, in the currency of the place in which the action is brought. And in making this computation, the actual current rate of exchange must be taken, and not the statutory rate.[4]

[1] De Peau *v.* Humphreys, 20 Mart. (La.) 1; Richards *v.* Globe Bank 12 Wis. 692; Vliet *v.* Camp, 13 Wis. 198; Chapman *v.* Robertson, 6 Paige Ch. 627; Kilgore *v.* Dempsey, 25 Ohio St. 413; Harvey *v.* Archbald, 1 Ry. & Moo. 184; Van Schaick *v.* Edwards, 2 Johns. 355; Healy *v.* Gorman, 3 Green (N. J.) 328; Bank of Georgia *v.* Lewin, 45 Barb. 340; Berrien *v.* Wright, 26 Barb. 208; Jacks *v.* Nichols, 5 Barb. 38 (overruling 3 Sand. Ch. 313, and affirming 1 Seld. 178); Potter *v.* Tallman, 35 Barb. 182; Meller *v.* Tiffany, 1 Wall. 310; Andrews *v.* Pond, 13 Pet. 65; Thompson *v.* Powles, 2 Sim. 194.

[2] Andrews *v.* Pond, 13 Pet. 65; De Wolf *v.* Johnson, 10 Wheat. 367; Mix *v.* Madison Ins. Co., 11 Ind. 117.

[3] Wood *v.* Corl, 4 Met. 203; Ballingalls *v.* Gloster, 3 East, 481; Jaffray *v.* Dennis, 2 Wash. C. C. 253; Aymar *v.* Sheldon, 12 Wend. 221.

[4] Cash *v.* Kennon, 11 Ves. 314; Lanusse *v.* Barker, 3 Wheat. 101; Lee *v.* Wilcocks, 5 Serg & R. 48; Whart. Confl. of Laws, § 514; 2 Parsons' N. & B. 370; Delegal *v.* Naylor, 7 Bing. 460; Scott *v.* Benan, 2 Barn. & Ad. 78; Grant *v.* Healy, 3 Sum. 523. But see Schofield *v.* Day, 20 Johns. 102; Martin *v.* Franklin, 4 Johns. 125; Adams *v.* Cordis, 8 Pick. 280, where it is held that the legal rate of exchange can alone be recovered, at least in the case of commercial paper, other than bills of exchange.

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